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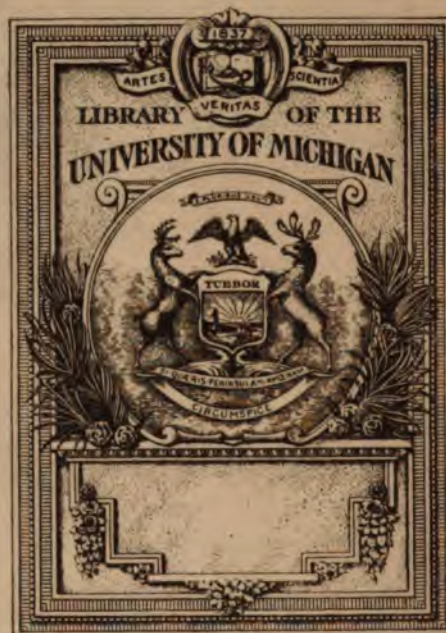
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U.S. Judge advocate general's Dept Army

**A DIGEST OF OPINIONS OF THE
JUDGE ADVOCATE GENERAL
CERTAIN DECISIONS OF THE COMP-
TROLLER OF THE TREASURY**

THE COURTS

AND

**CERTAIN OPINIONS OF THE
ATTORNEY GENERAL**

**FROM JULY 1, 1912
TO APRIL 1, 1917**



**WASHINGTON
GOVERNMENT PRINTING OFFICE**

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WAR DEPARTMENT
Document No. 572,
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**DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL, CERTAIN
DECISIONS OF THE COMPTROLLER OF THE TREASURY AND THE
COURTS, AND CERTAIN OPINIONS OF THE ATTORNEY GENERAL.**

JULY 1, 1912, TO APRIL 1, 1917.

BULLETIN 12.

**BULLETIN }
No. 12. }**

**WAR DEPARTMENT,
WASHINGTON, August 8, 1912.**

The following digest of opinions and decisions rendered by the Judge Advocate General, the Comptroller of the Treasury, the Attorney General, and the courts is published for the information of the service in general.

It is intended to embrace all important opinions rendered by the Judge Advocate General from January 31, 1912, to which date, inclusive, the latest published Digest of said opinions extends, to June 30, 1912, inclusive; but it has been deemed proper to publish some of earlier date which could not be included in the General Digest or the importance of which seemed to justify further publication.

The other opinions and decisions which have been digested and which are deemed of special importance to the service cover practically the same period, but for obvious reasons embrace many that are of date prior to the publication of the last Digest and could not be noted therein.

It is the purpose to make this and similar bulletins issued at stated times the basis of supplements to the published Digest and in this manner to keep the same up to date as far as practicable.

[1931376, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

HENRY P. MCCAIN,
Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ARMY: Retiring board; action of President on report of.

The President may not modify the finding of a retiring board. He may approve or disapprove the finding, but, subject to his right

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to return it to the board for recommendation, beyond this he may not go. If the President approve the finding, the law indicates what shall or may be done. (See secs. 1249-1252, Rev. Stat.) If he disapprove, the proceedings and finding of the board are nullified.

(C. 29449, Feb. 17, 1912.)

ARTICLES OF WAR: Discharge by department commander under fourth Article of War.

Under the fourth Article of War a department commander may order the discharge of an enlisted man whose term of service has not yet expired, but paragraph 139, Army Regulations, 1910, serves to direct that he shall not exercise this right which the law gives him. *Held*, that the regulation is lawful, as it does not seek to controvert a statute, but merely to regulate the conditions under which the power granted by the statute may be exercised. It follows that should a department commander order the discharge of one of his men before the expiration of his term of enlistment the discharge would be entirely legal, but the officer ordering it would have acted in disobedience of a regulation.

(C. 23259, Apr. 12, 1912. See also G. O. 174, W. D., 1909.)

CIVIL AUTHORITIES: Surrendering soldier to; Fifty-ninth Article of War.

The terms of this article, which provides for the delivery to the civil authorities of any officer or soldier accused of a crime or offense punishable by the laws of the land, have never been regarded as modifying or affecting the operation of the rule of comity which prevails wherever two independent criminal courts have jurisdiction of the same person or case, the rule being that the authority whose jurisdiction first attaches, by reason of process retains jurisdiction until its claim has been completely satisfied. (C. 23264, May 27, 1909.) Under the above rule, where a soldier was sentenced to dishonorable discharge with confinement, and while serving confinement escaped and reenlisted in the military service under an assumed name and was again arrested and, his identity having been discovered, was placed in arrest to serve out his sentence, and the civil authorities presented a warrant for his arrest for a crime committed after his escape. *Held*, that the soldier should not be surrendered.

So also where before his enlistment a soldier had committed a crime for which he had been sentenced to the penitentiary, and while out of the penitentiary on a conditional pardon left the State in violation of its terms and enlisted in the military service, and was dishonorably discharged therefrom pursuant to the sentence of a general court-martial. *Held*, that under the above rule of comity he should not be surrendered to the civil authorities. (C. 28963, Nov. 11, 1911.)

(C. 23264, May 24, 1912.)

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CIVILIAN EMPLOYEES: Civil service; removal of.

So long as a civil-service employee is fit for service and is performing his duty efficiently within the meaning of rules 5 and 12, Civil Service Regulations of February, 1912, he can not be removed from office on the ground that he is subject to a disability which would increase the possibility of an accident for which the United States would be liable under the act of May 30, 1908 (35 Stat., 556).

(C. 23069, Mar. 27, 1912.)

CLAIMS: Assignment of, section 3477, Revised Statutes.

The Government had a contract with the Helena Waterworks Co. whereby the latter agreed to supply the Army post near the city of Helena, Mont., with water and to renew the agreement annually within a certain stated period. In a suit in the Federal court the company's affairs were placed in the hands of a receiver, and that official, under the order of the court, sold the property of the company, including a claim against the United States for water furnished, to the Old Colony Trust Co. *Held*, that payment of the accrued claim for water furnished by the said company to the United States should be made to the assignee, the Old Colony Trust Co., as the transfer of the claim was in the nature of an involuntary assignment or transfer by operation of law and not in violation of section 3477, Revised Statutes, forbidding the transfer of claims against the United States.

(C. 25394, Mar. 30, 1912.)

CLAIMS: Claim for cattle killed where troops had removed a fence on leased land.

The United States, having leased land for maneuver purposes, later vacated the premises, the landlord accepting the return of the same in the condition in which the troops left them, and receiving compensation for certain assessed damage, including that to fences. Two days after the premises had been vacated by the United States three head of cattle strayed therefrom onto the railroad and were killed. The landlord who owned the cattle advanced a claim against the Government for the value of the same, based on the allegation that the cattle had been killed because a portion of a fence had been removed by the troops. *Held*, that the claim was inadmissible, as the damage accrued after the Government had relinquished the premises, and further because the landlord having accepted settlement for damage to his fences had by so doing accepted responsibility for them in the condition in which they were left.

(C. 23472, May 1, 1912.)

CONTRACTOR: Delays by; exclusion from future bidding.

Where a contractor completed its contract, after unjustifiable delay and attempts to evade the contract requirements, on the recommendation that the contractor be debarred from further work, under G. O. 167, War Department, October 10, 1905. *Held*, that there was not

such failure to fulfill the contract as is contemplated in said general orders, but that, in letting future contracts on which this contractor might submit the lowest bid, it would be proper to consider the facts above stated in determining whether such bid should be considered the lowest and *best* bid.

(C. 29482, Mar. 4, 1912.)

CONTRACTS: Advertising; accepting next higher bid.

Where two bids were received by the Signal Corps for deep-sea cable, but the superiority of the cable offered at the higher bid more than compensated the difference in price, it was held that the higher bid might be accepted as being the lowest and best bid for the Government, having regard to the quality of the cable to be secured.

(C. 29451, Feb. 17, 1912.)

CONTRACTS: Advertising; alteration of bids.

The day before bids for the manufacture of certain overcoats were to be opened, telegraphic request was sent to all who had presented bids to make other bids upon a coat with a material alteration from the kind required in the original advertisement. *Held*, that the law requiring all purchases of supplies, except in certain specified cases, to be made only after due advertisement, requires a notice that will reach the general public or that portion of it engaged in the manufacture or sale of the particular articles wanted, and for a sufficient length of time to allow for the making of bids, and said law was not complied with under the conditions stated. It is recommended that all bids received in response to such telegraphic notice be rejected.

(C. 29470, Feb. 28, 1912.)

CONTRACTS: Advertising; increasing quantities.

Where an advertisement was made for building material for 5 sets of field officers' quarters and 19 double sets of company officers' quarters, subject to an increase or decrease of 20 per cent, and after bids were received it was proposed to make contracts for material for 11 and 33 sets, respectively. *Held*, that such a contract would not be in accordance with the advertisement and would not be a compliance with the law requiring advertising for such supplies. *Held*, however, that if it be determined that there is such an exigency as will not permit of the delay incident to readvertising there would be no legal objection to the proposed contract.

(C. 29600, Apr. 11, 1912.)

CONTRACTS: Construction of; "corner pins" on cross arms of electric-lighting system.

The contract for an electric-lighting system provided that the pins on the cross arms of the poles, "except corner pins, shall be of the best locust." On claim by the contractor for extra compensation for being required to furnish iron pins at the ends of the lines and also where angles occurred. *Held*, that the term "corner pins" was properly construed by the supervising inspector as including a considerable

change in direction (see *Christian v. Gernt* (Tenn.), 64 S. W., 399, 401), but that the term would not include pins on the cross arms at the ends of the lines.

(C. 29482, Mar. 4, 1912.)

CONTRACTS: Delays in performance; adjustment of unliquidated damages.

A firm had a contract for the construction of the principal buildings at the Fort Sill, Okla., new artillery post, and others had contracts for doing various work in said buildings and about the post, dependent upon the construction or progress of construction of said buildings. The principal contractors delayed the execution of their work, thereby causing delay and loss to the other contractors. *Held*, that such losses, in so far as the United States might be answerable for them, were unliquidated damages for breach of contract which the executive officers have no jurisdiction to settle or allow (17 Comp. Dec., 810; *Cramp & Sons v. U. S.*, 216 U. S., 494); but the probable amount of such losses for which the Government might be liable in an action on the contracts should be retained from the contract price in settling with the contractors whose delays occasioned the losses, as a protection to the United States.

(C. 27675, Mar. 7, 1912.)

CONTRACTS: Indemnity against infringement of patent.

Where the United States having a license to manufacture or have manufactured, for the use of the United States, Army field bake ovens covered by a particular patent, entered into a contract with a private firm, which made no claim to any rights in the premises, for the manufacture of the ovens according to the patent, and notice was served on the manufacturer that the oven covered by said contract was an infringement of another patent for an improved camp oven. *Held*, that in the light of these facts, although there was no express provision in the contract that the United States would indemnify the contractor against claims for infringement of other patents, there would be an implied obligation to do so, under the rule that where an act, not apparently illegal in itself, is done under the express directions of the other party to a contract, and occasions injury to the rights of third persons, the party doing the act is entitled to indemnity against the consequences of the act, provided it is done honestly and bona fide in compliance with directions. (22 Cyc., 95; *King v. United States*, 1 Ct. Cls., 38.) *Held further*, that there was clearly no obligation on the part of the contractors to proceed with the contract if by so doing they would render themselves liable for infringement, without provision for reimbursement by the United States, and that the urgent need of the Government for the ovens would make it to the interest of the United States to enter into a supplemental contract with them whereby the Government would expressly undertake to indemnify them against any claims for infringement of the patent rights of other patentees.

(C. 25188, Apr. 8, 1912.)

CONTRACTS: Sufficiency of notice to make delivery of articles purchased.

A contract provided for the delivery of a certain amount of grain to the United States in quantities ordered by the depot quartermaster, that portion delivered prior to December 31 to be paid for at a certain rate, while the portion delivered afterwards was to be paid for at a higher rate. Notice was given in the latter part of December for delivery during that month of the entire balance of grain due under the contract. Delivery was not made until after December, and compensation was claimed at the higher rate upon the ground that there was not sufficient time after notice for making delivery in December, and that even if delivery had been tendered in that month the Government was not in position to receive it. *Held*, that it was the duty of the Government to have given notice for the delivery of the grain in sufficient time to have permitted its delivery within the month of December, and if it did not, and delivery was accepted, after that month, payment for the grain delivered should be made at the prices provided for in the contract for deliveries at the time when they were actually made; and further, that the Government should also have been in a position to have received the grain in December, if tendered, in order to have availed itself of the prices fixed for December deliveries.

(C. 29573, Apr. 3, 1912.)

COURTS-MARTIAL: Discipline; reviewing authority.

The action of a reviewing authority in approving a sentence of a general court-martial and simultaneously remitting a portion thereof is legally equivalent to approving only the sentence as reduced.

(C. 23038, May 2, 1912.)

DESERTER: Reward for apprehension; additional expenses.

A sheriff of one of the Hawaiian Islands transported a deserter from the United States Army to Honolulu where he was delivered to the military authorities, and in so doing expended a sum very nearly equal to the \$50 reward authorized for the apprehension and delivery of deserters. On submission of the question as to whether there were any means by which the expenses might be paid and the sheriff receive the full reward. *Held*, that the \$50 reward authorized by Army Regulations, made in pursuance of law, for the return of deserters from the United States Army, must include all expenses of apprehending and bringing the deserter to the nearest military post or to a place agreed upon; but that there is no restriction placed upon the cost of the journey of an armed party sent to receive the person arrested and held as a deserter.

(C. 17327-B, Feb. 15, 1912.)

DESERTERS: Reward for apprehension; claim of policeman for arresting deserter after he had surrendered to military authority.

Where a deserter had surrendered to a recruiting sergeant, had been placed in arrest, paroled to a given date, and while at large under such parole was arrested as a deserter by a police officer who

claimed to believe that the deserter intended to escape. *Held*, that the police officer was not entitled to the reward for the apprehension and delivery of a deserter.

(C. 17327, May 29, 1912.)

DESERTERS: Reward for apprehension; confined in prison.

A bertillion clerk at a State penitentiary informed the military authorities that a prisoner at that institution was probably a deserter, which information led to his apprehension and arrest by said authorities immediately upon the termination of his term of imprisonment. The other penitentiary officers did nothing more than turn the prisoner over to the military authorities at the end of his term, and disclaimed any interest in the reward. *Held*, that the person furnishing the information was entitled to the entire reward offered for the return of the deserter and that it was not necessary that he should personally have made the arrest and delivery to the military authorities.

(C. 17327-B, Feb. 9, 1912.)

DESERTERS: Reward for apprehension; delivered as absent without leave, but tried for desertion.

Where a police officer delivered to the military authorities a soldier as having been absent without leave, but who was later deemed by those authorities to be a deserter and was tried as such. *Held*, that the police officer is entitled to a reward as having apprehended and delivered a deserter, and this though the soldier was acquitted of desertion and convicted of absence without leave only.

(C. 17327-B, Apr. 17, 1912.)

DISCIPLINE: Punishment in reducing from first-class private.

The maximum punishment order provided that for certain offenses first-class privates might be reduced to second-class privates. Pursuant to this order a first-class private of the Signal Corps was sentenced to "be reduced from first-class private to second-class private." At the time the only privates in the Signal Corps were "first-class privates" and "privates." There were no "second-class privates." *Held*, that as the only grade below that of first-class private was private, the effect of the sentence was to reduce the soldier to the grade of private.

(C. 3694, May 20, 1912.)

EIGHT-HOUR LAW: Government employees; extraordinary emergency.

Under the act of August 1, 1892 (27 Stat., 340), it does not constitute a sufficient statement of an extraordinary emergency to report merely that a laborer or mechanic was employed overtime on account of "working aloft as rigger," "extra attention required to floating plant," "repairing derrick," "repairing machinery of work-

ing plant," or "making necessary repairs to machinery." An emergency is an event or occasional combination of circumstances which calls for immediate action or remedy, and the report of an extraordinary emergency, required by paragraph 742, Army Regulations, 1910, should show that conditions demanded immediate action or remedy.

(C. 20169-C., Feb. 2, 1912.)

EMPLOYEES: Presents to official superiors.

Section 1784, Revised Statutes, provides that no officer, clerk, or employee in the Government service shall solicit contributions from officers, clerks, or employees in the same service for a gift or a present to any one in a superior official position, and prohibits any such official or clerical superior from accepting any such present. *Held*, that the forelady in the tent department of the Philadelphia, Pa., depot of the Quartermaster's Department, who only has the duty of distributing work among employees and superintending its execution, is not an official or clerical superior nor a person occupying a superior official position within the meaning of said statute, and does not violate its provisions by accepting presents from employees under her direction which have been paid for with money raised by voluntary subscription among such employees, nor does the employee who solicits such subscription thereby violate said statute.

(C. 29736, May 29, 1912, p. 13.)

ENLISTED MEN: Engaging in commercial business; hiring out automobiles.

Complaint having been made that certain enlisted men owning automobiles at a post were letting them out for hire and were competing with a regular stage line between the post and a neighboring village. *Held*, that while enlisted men do not by enlistment lose their rights as citizens to engage in commercial business, and while there is no objection to their owning automobiles and allowing others to use them for hire, yet, for military reasons, they should not be permitted to maintain anything in the nature of a regular system of transportation for gain.

(C. 29467, Feb. 29, 1912.)

GRATUITY: Deceased officers and soldiers; carelessness or accident not misconduct.

In civil actions to recover damages from a defendant on account of injuries caused by the defendant's negligence, the rule is that if the plaintiff has failed to exercise that reasonable degree of care and diligence which a person of ordinary prudence and capacity might be expected to exercise under similar circumstances, he is himself guilty of contributory negligence and can not recover from the defendant. But in cases arising under the act of May 11, 1908 (35 Stat., 108), as amended by the act of March 3, 1909 (35 Stat., 735), which provides for the payment to certain beneficiaries of a gratuity

equal to six months' pay of an officer or enlisted man on notice of his death from wounds or disease "not the result of his own misconduct," the above rule preventing recovery in case of contributory negligence can not be applied as a test of whether six months' pay shall be paid to the beneficiary of the deceased officer or soldier. This is for the reason that "misconduct," which is the test applied by the above acts, implies something in the nature of intentional wrongdoing, the transgression of some established rule, military, civil, or moral, or a reckless disregard of one's safety, etc. Carelessness or an accident on the part of the deceased officer or soldier not amounting to "misconduct" will not defeat payment to the beneficiary.

(C. 23666, June 25, 1912.)

GRATUITY: Payable on death of soldier; soldier's misconduct.

Where a soldier absent from his station, whether with or without leave, trespasses upon private property, he assumes the risk of injury resulting from such a trespass, and such an injury would be not in line of duty and would be the result of his own misconduct. (C. 23666, Aug. 4, 1909; Oct. 4, 1910.) The determination whether a soldier's death while trespassing on tracks of a railroad company is in line of duty or results from his own misconduct in a given case, does not in any way depend on the liability of the company to the soldier for damages. (C. 23666, Sept. 19, 1910.) Nor does it depend on whether the soldier was violating a military rule or regulation, but rather does it depend on the quality or condition of the act itself of the soldier.

(C. 23666, Feb. 29, 1912, citing 2 Pension Decisions, 232.)

MEDICAL ATTENDANCE: Seamen in the Army Transport Service; appropriations.

A seaman in the Army Transport Service was sent to an Army hospital ashore for temporary treatment. *Held*, that seamen in the United States Army Transport Service are entitled under their contract of employment to all the benefits which usually pertain to the service of a seaman, or which may be provided for such service by regulation, which include needful medicines and medical attendance; and when one receives treatment ashore by authority of the officers of the vessel on which he is engaged, the expenses therefor are a charge against the United States. *Held further*, that the appropriation for medical attendance and supplies under the control of the Medical Department is chargeable with the expenses of such treatment, said appropriation being more specific as to this purpose than that for the transportation of the Army to which the service is incidental.

(C. 24389, May 28, 1912.)

MILITARY ACADEMY: Reappointment of cadet under section 1325, Revised Statutes.

Where a cadet had been found deficient and recommended for discharge by the Academic Board and had as a result been discharged.

Held, that under section 1325, Revised Statutes, the former cadet, although he had passed the age fixed for original admission to the Academy, might be reappointed, as section 1325, Revised Statutes, shows no age requirement and clearly has for its intent not to permit one who has been a cadet to commence or recommence his career at the Military Academy, but to continue it.

(C. 16602, Mar. 22, 1912.)

MILITARY RESERVATIONS: Power of the President over public lands.

Any military reservation, whether so designated by presidential or congressional authority, which, in the opinion of the President, has become useless for military purposes, may be turned over to the control of the Secretary of the Interior for disposition under the act of July 5, 1884 (23 Stat., 103), and may, either before or after the turning over of the same to the control of the Secretary of the Interior and before disposition thereof, be set aside by him for some other public purpose in the same manner as other public lands.

(C. 29379, Apr. 6, 1912.)

MILITIA: Accounting for tent equipage used by the governor of the State for the relief of flood sufferers.

The governor of the State of Arkansas loaned to the sufferers from the Mississippi floods certain tent equipage which had been issued to the State by the United States for the use of the organized militia, and thereafter requested an additional issue of such equipment for the use of said militia, in view of the fact that it was uncertain when the State would receive back the tentage so loaned, and also whether when received back it would be in condition for use. *Held*, that supplies and equipage issued to the several States for the use of the militia thereof and paid for from the appropriations under section 1661, Revised Statutes, remain the property of the United States until consumed, and that the Government might take over said tentage at its actual value when turned over for the use of the flood sufferers and continue to use the same for the relief of said sufferers, crediting the State's allotment from said appropriation and charging the appropriation available for the purchase of tentage for such purpose.

(C. 29692, May 13, 1912.)

MILITIA: Machine-gun organizations.

Section 3 of the militia law of January 21, 1903 (32 Stat., 775), provided that the organization, armanent, and discipline of the Organized Militia shall be the same as that prescribed for the Regular Army. This section was amended by section 2 of the act of May 27, 1908 (35 Stat., 399), by adding the words "subject in time of peace to such general exceptions as may be authorized by the Secretary of War." *Held*, That this exception is broad enough to include machine-gun units or organizations containing additional commissioned officers and enlisted men to those prescribed for batteries in the Regular

Army, and the officers and men are entitled to be paid as a part of the Organized Militia while rendering service otherwise entitling them to such pay, provided that said organizations are uniform so as to make the exception general.

(C. 14148-I, June 4, 1912.)

MILITIA: Officer of the Army detailed as instructor and inspector.

An officer of the Army was detailed as instructor and inspector for the Organized Militia of the State of California, under the provisions of the act of March 3, 1911 (36 Stat., 1045). On reporting to the governor of the State he was directed by him to proceed from Sacramento to San Francisco, in said State, for the performance of duties in connection with the Organized Militia. *Held*, that the expense of his transportation from Sacramento to San Francisco, being incident to his service to the militia and not to his service to the United States, is not a charge against the United States, and the officer must look to the State for reimbursement.

(C. 14148, June 15, 1912; see also Decision of the Assistant Comptroller of the Treasury of Mar. 18, 1912.)

MILITIA: Officers of the Regular Army holding commission in.

While an officer in the Regular Army is not precluded by section 1222, Revised Statutes, from holding office in the Organized Militia of a State, yet where, by the laws of a State, he can not be so commissioned as to permit his release at the will of the Secretary of War from his obligations as a militia officer, *advised*, that the officer be not granted permission to accept such militia appointment.

(C. 14148-I, June 15 and 17, 1912.)

MILITIA: Officer on active list in the Regular Army holding office in; compatibility; holding two offices.

Held, that an office in the Organized Militia of a State is a military and not a civil office and that an officer of the Regular Army on the active list is not precluded from holding a commission in the Organized Militia by section 1222, Revised Statutes, which prohibits such officer from holding or exercising the functions of any civil office. *Held further*, that the office held by a commissioned officer in the regular service and that held by a commissioned officer in the State militia are not legally incompatible and may be held by the same person, but that State laws might impose conditions rendering it impracticable or impossible for the officer to hold both positions at the same time. *Held further*, that under the act of July 31, 1894 (28 Stat., 205), which provides that—

“No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law; but this shall not apply to retired officers

of the Army and Navy whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate."

a Regular Army officer may accept a commission in the State militia, as "any other office" refers to a Federal office only.

(C. 29273, Nov. 28, 1911.)

MILITIA: Use of outside of the United States.

Under existing law the President is not authorized to call out the Organized Militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation, especially where the United States should intervene in the affairs of another nation under conditions not involving actual war.

(C. 14148-I, Dec. 20, 1911.)

NAVIGABLE WATERS: Construction of term "Appurtenances."

Where, by act of Congress approved June 25, 1910 (36 Stat., 640), the Secretary of War was authorized to enter into contract, subject to "ratification and appropriation by Congress," for the purchase of a canal "together with all property, rights of property, and all franchises appertaining thereto," and the canal company, while agreeing to include in the agreement lands of ample width for the canal right of way, and all property needed for the purpose, withheld lands owned by it alongside the same as not properly pertaining to the canal. *Held*, that as it was probably not the intent of Congress to require a conveyance of lands not needed or used in connection with the canal, and as the word "appurtenances" is susceptible of a broad or a restricted meaning according to the context of the subject matter, the agreement as executed by the company should be approved, subject to ratification by Congress.

(C. 29445, Feb. 17, 1912.)

PAY OF OFFICERS: Officers serving abroad by special authorization of Congress.

An officer of the Army was authorized by a special resolution of Congress to accept employment under the Chilean Government. *Held*, that he is in the position of an officer awaiting orders at a place of his own selection, and is entitled during the period of such service to the ordinary pay of his grade, not including additional pay for foreign service, but is not entitled to any allowances.

(C. 29481, June 15, 1912.)

POST EXCHANGE: Responsibility for money collected at pay table and due to an exchange.

Where a company of infantry had been temporarily stationed near a post which maintained an exchange and the men of the company had been allowed credit thereat, but had left the neighborhood before pay day and subsequently paid the amount of their exchange in-

debtedness to their company commander. *Held*, that the post exchange must look to the company commander for the money due it, and that the fact that he did not pay it over could not serve to render the enlisted men liable for a second payment. The confidence of enlisted men in their superior officers should not be shaken by even the suggestion that where they have in good faith reposed confidence in such superior officer they should be told that they did so at their peril.

(C. 29656, Apr. 30, 1912.)

PRIVATE MILITARY BODY: Assuming the name of "U. S. Volunteers."

Where a private signal corps, to be maintained independently of State or national aid, asked whether there was any reason why it should not assume the title of "U. S. Volunteers." *Held*, that there was no Federal law which would prevent the use of that or any other name by such an organization; but advised that the good taste and good faith involved in the assumption of the name of an organization which clearly is not national in its character nor in any sense connected with the United States would seem questionable.

(C. 29058, May 1, 1912.)

PUBLIC PROPERTY: Donation of personal property to the United States.

Upon question being raised as to the authority of the War Department to permit abutting landowners to string additional wires on the Government fence around the military reservation of Leon Springs, Tex., to make the fence more secure for their stock, under an agreement that the wires, when so placed, should become the property of the United States. *Held*, that in the absence of a statute forbidding the acceptance of donations of personal property, such as applies to the acceptance of voluntary services or of donations of land, there is no legal objection to the permission being granted, under the proposed agreement, it appearing that such permission would be in the interests both of the Government and of the abutting landowners.

(C. 29257, Mar. 9, 1912.)

PUBLIC PROPERTY: Land boundary; commission; res judicata.

Where claim was made that a military reservation, as described in the reservation order, included land of the claimant estate, and it appeared that the matter of the boundary had been determined by a boundary commission against the contention of the claimant, the decision being affirmed on appeal by the supreme court of the Territory. *Held*, that the determination so made should be regarded as final, and that possession of the land in dispute should be retained, leaving the claimant to his remedy at law to recover possession of the land. *Held further*, that even if the question were a doubtful one, possession should be retained until the matter should be judicially determined adversely to the United States.

(C. 19852, Mar. 19, 1912.)

PUBLIC PROPERTY: Real estate; title to reservations conveyed to the United States, without cost, for military posts.

Certain reservations were conveyed to the United States under acts of Congress providing that upon "transfer and conveyance to the United States of a good and sufficient title" to the premises, "without cost to the United States," military posts should be "established and located on said" lands. The deeds recited nominal considerations and purported to convey a fee simple title free and clear of all incumbrances, and the title was approved by the Attorney General. After the establishment and maintenance of the posts, for periods varying from 15 to 20 years, it was proposed to abandon them, and the question was raised as to whether the title of the United States to the lands so acquired was such as to permit of the sale of the same. *Held*, that in making the conveyances the grantors may be assumed to have understood that nothing less than a fee simple title, free and clear of all incumbrances, would be accepted by the Government; and that, such being the case, no court would reform the deeds by engrafting thereon, contrary to this understanding, limitations of the title to the purposes for which the property was conveyed.

Held further, that even if the facts stated be regarded as amounting to implied conditions, such conditions were fully satisfied, on the part of the United States, when the posts were established at the places specified, with no intention of the establishment being temporary. See *Mead v. Ballard* (7 Wall., 290); *Harris v. Shaw* (13 Ill., 463); *Sumner v. Darnell* (13 L. R. A., 173); *Newton v. Commissioners* (100 U. S., 548); that there was nothing in the acts under which the posts were established to show an intention to bind the Government permanently to maintain military posts at these locations; and that as to such reservations, the title in fee is in the United States without any limitation which would prevent the sale or other disposition of the property by the United States when no longer required for military purposes.

(C. 29379, Mar. 6, 1912.)

PUBLIC PROPERTY: Title to real property; delivery of deed.

Where a deed was executed and delivered to the United States, but not recorded, for the donation of a tract of 640 acres as a site for a military post at Santa Fe, N. Mex., and the bill for authorizing the acceptance of a site at that place was not passed by Congress, on the question being raised as to the course to pursue to restore the land to the grantors. *Held*, that in view of the provisions of section 3736, Revised Statutes, the deed was inoperative to pass any title to the Government, and that as it was not placed on record it would be sufficient to return it to the grantors.

(C. 1582, Feb. 17, 1912.)

SALE OF PUBLIC PERSONAL PROPERTY: Sale of articles of medical equipment to Red Cross.

The American National Red Cross having requested the privilege of purchasing certain articles of medical equipment, the property of the United States, from the Medical Department of the Army.

Held, that under Article IV, section 3, paragraph 2, of the Constitution, the Congress alone has the right to dispose of the public property, whether real or personal, and that therefore in the absence of authority from Congress the request of the American National Red Cross could not be granted. (See *U. S. v. Nicoll*, Fed. Cas. No. 15879; and 16 Op. Atty. Gen., p. 477.)
(C. 16453, May 28, 1912.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

APPROPRIATIONS: Public buildings; cost of plumbing therein.

Sundry civil appropriation act of March 4, 1909 (35 Stat., 1004), for the fiscal year 1910 provides:

"Cavalry post, Hawaii Territory: for the construction of the officers' quarters, barracks, storehouses, etc., necessary for the accommodation of headquarters and two squadrons of cavalry, \$200,000."

The sundry civil appropriation act for the fiscal year 1910 authorized contracts to be entered into for a greater amount than that appropriated for, but made no other changes in the conditions or terms of the appropriation.

The Army appropriation act of March 3, 1911 (36 Stat., 1051), for the fiscal year 1912, under the heading "Water and Sewers at Military Posts," provides:

"For procuring and introducing water to buildings and premises at such military posts and stations as from their situation require it to be brought from a distance; for the purchase and repair of fire apparatus; for the disposal of sewage; for repairs to water and sewer systems and for hire of employees, \$2,250,903.27."

Upon a request by the Secretary of War for a decision as to whether or not the appropriation for the construction of buildings at the cavalry post, Hawaii Territory, is available for the installation of plumbing fixtures therein to the exclusion of the use for the same purpose of the current appropriation for water and sewers at military posts. *Held*, that the cost of plumbing within said buildings should be paid from the appropriations made for the construction of the same and not from the appropriation for "water and sewers at military posts."

(18 Comp. Dec., 612, Feb. 12, 1912.)

ENLISTED MEN: Continuous service; purchase of discharge.

A private served three consecutive enlistments of three years each in the Army, and enlisted for the fourth, but purchased his discharge after serving less than half his term, and enlisted in the Marine Corps. *Held*, that the time served in the uncompleted enlistment period in the Army should not be computed in making up the fourth enlistment period, on which he entered as an enlisted man of the Marine Corps.

(18 Comp. Dec., 714, Mar. 20, 1912.)

ENLISTED MEN: Six months' gratuity; death of beneficiary.

When a private in the Marine Corps designates his father as his beneficiary to receive the six months' pay under the provisions of the act of May 13, 1908 (35 Stat., 128), and makes no designation of an alternative beneficiary, and after the private's death his father dies before receiving the six months' pay gratuity, such pay can not be paid to the legal representatives of the beneficiary.

(18 Comp. Dec., 660, Feb. 28, 1912.)

ENLISTMENT IN MARINE CORPS: When it becomes effective.

A man who made application for enlistment in the Marine Corps on December 20, 1909, and successfully passed the physical examination the next day, but who was not accepted in the service and subjected to military authority and control until January 15, 1910, when he signed the contract of enlistment and was sworn in, did not enlist until the later date and is not entitled to pay and allowances of an enlisted man prior to that time.

(18 Comp. Dec., 604, Feb. 9, 1912.)

EXTRA-DUTY PAY: Service at the United States Military Academy.

Section 1287, Revised Statutes, and the act of March 3, 1885 (23 Stat., 359), provide for the payment of extra-duty pay to soldiers performing extra-duty service, and the appropriation for incidental expenses, Quartermaster's Department, provides for the payment of the same; but the act of March 2, 1907 (34 Stat., 1167), provides that: "Hereafter no part of the moneys appropriated for use of the Quartermaster's Department shall be used in payment of extra-duty pay for the Army service men in the Quartermaster's Department at West Point."

The Military Academy act of March 3, 1911 (36 Stat., 1025-27), contains appropriations for maintaining the children's school and for carrying on the development of the general plan for improvements to roads and grounds on the military reservation at West Point. *Held*, that enlisted men not belonging to the Army service detachment at West Point who are detailed and employed on extra duty under competent authority in connection with the maintenance of the children's school or the improvements to roads and grounds on the military reservation at West Point, and otherwise coming within the laws and regulations relative to extra duty, are entitled, for such service, to the extra-duty pay provided by law, and the same should be paid from said appropriations for maintaining the children's school and for the improvements to roads and grounds.

(Decision of Asst. Comptroller L. P. Mitchell, June 5, 1912.)

LAND-GRANT RAILROADS: Michigan Central Railroad; computation of earnings.

The Michigan Central Railroad is a land-grant railroad between Lansing, Mich., and Mackinaw City, Mich., and the earnings on Government business over said distance or any part thereof are subject to the land-grant deduction required by law.

The earnings of the land-grant portion of a railroad used for Government business are to be determined on the basis of the original land-grant mileage in connection with the nonaided mileage used for said service.

(18 Comp. Dec., 674, Mar. 6, 1912.)

OFFICERS OF THE ARMY: Selection of home on retirement.

There is no law or regulation which limits the selection of the home by any Army officer on retirement from active service to a place within the continental limits of the United States, and where an officer serving in the Philippine Islands is retired and selects his home in Germany, such officer is entitled to the mileage and actual expenses which the law gives in traveling to his home when he makes the journey under proper orders within a reasonable time after the date of retirement.

(18 Comp. Dec., 634, Feb. 26, 1912.)

PAY AND ALLOWANCES: Fuel allowances; use of by family of officer.

During the entire period from September 1, 1910, to April 30, 1911, a lieutenant colonel of the Army was on duty at his permanent station in Alaska and regularly occupied two rooms assigned to him as quarters, which were heated by fuel issued by a quartermaster. At the officer's request and upon his certificate that he would use 2,000 pounds of bituminous coal and not use 10,870 pounds of bituminous coal per month during said period, there was issued to his family at Shrewsbury, N. J., 64,000 pounds of anthracite coal, for which the quartermaster paid the sum of \$187.20. The auditor disallowed this item in the accounts of the acting quartermaster, and the latter appealed to the comptroller from the auditor's decision. *Held*, that when the quarters actually occupied by an Army officer are heated at the expense of the United States he is not entitled to have any additional fuel issued to himself or to his family at the expense of the United States, notwithstanding the fact that he may not have occupied the full number of rooms to which his rank entitled him, or that the quantity of fuel used to heat the rooms which he occupied as quarters may have been less than the quantity which the regulations prescribe as the maximum quantity for the number of rooms which he occupied. *And held further*, that when an officer on duty in Alaska occupies public quarters heated at his own expense, the quantity of fuel which, under the regulations, may be issued at the expense of the United States to his family can not exceed the quantity prescribed in the regulations for the number of rooms actually occupied as quarters by said officer.

(18 Comp. Dec., 592, Feb. 8, 1912.)

A rehearing was requested upon a certificate showing that the officer occupied his full allowance of six rooms, but the rehearing was denied upon the ground that all the rooms occupied had been heated at Government expense.

PAY OF ENLISTED MEN: Deductions of indebtedness due the United States from travel pay on discharge.

An enlisted man was brought back from absence without leave at an expense for himself and his guard of \$30.15, which, with other amounts, made his indebtedness to the United States exceed the balance of pay due on his final discharge. *Held*, that an enlisted man's indebtedness to the United States on account of transportation furnished him on returning him to his station from absence without leave is not a proper charge against the soldier's travel pay due him on final discharge from the service.

(18 Comp. Dec., 621, Feb. 23, 1912.)

REENLISTMENT PAY: Computation of; extra-duty pay.

A soldier enlisted and was discharged from the service after serving the full term of his enlistment. For some time prior to his discharge he was employed on extra duty as a mechanic at the rate of 50 cents a day and was so employed until the day before his discharge, on which day, being Sunday, he rendered no extra-duty service and received no extra pay therefor. *Held*, following decision in 17 Comp. Dec., 828, that said extra-duty pay received by the soldier should not be included in computing the three months' pay for reenlistment within that period.

(Asst. Comptroller L. P. Mitchell, Jan. 2, 1912.)

TRANSPORTATION OF BAGGAGE ALLOWANCE: Change of station; horses not regarded as baggage.

Horses are not regarded as baggage or "baggage in excess of regulation change-of-station allowance" within the meaning of Army Regulations and the act of March 23, 1910 (36 Stat., 255), and where an officer on changing station has had transported at public expense from his old to his new station all the horses for which he is legally entitled to forage, the Government has discharged its legal obligations with respect to the transportation of his horses.

Where an officer ships horses in excess of the number he is legally entitled to forage for, such horses should be transported at his own expense and on a commercial bill of lading and not on a Government bill of lading.

(18 Comp. Dec., 494, Jan. 2, 1912.)

OPINIONS OF THE ATTORNEY GENERAL.**CONTRACTS:** Modifications of and payment of damages.

The Secretary of the Navy may insert in the contracts for vessels constructed under authority of the act of March 4, 1911 (36 Stat., 1265), a provision for making changes in said contracts and for determining the amount of increased or diminished compensation arising therefrom, whether such compensation be of the nature of liquidated or unliquidated damages.

(29 Op. Atty. Gen., 285, Dec. 21, 1911.)

CONTRACTS: Return of, for filing; disclosure of confidential plans.

The Revised Statutes of the United States provide:

"SEC. 3744. It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof, a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within 30 days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return.

"SEC. 3745. It shall be the further duty of the officer before making his return, according to the preceding section, to affix to the same his affidavit in the following form, sworn to before some magistrate having authority to administer oaths: 'I do solemnly swear (or affirm) that the copy of contract hereto annexed is an exact copy of a contract made by me personally with ———; that I made the same fairly without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said ———, or any other person; and that the papers accompanying include all those relating to the said contract, as required by the statute in such case made and provided.'"

On application of the Secretary of the Interior for opinion as to whether a certain affidavit annexed to a contract sent to him for filing, and containing the statement that the accompanying papers included all those relating to said contract except certain plans which were confidential and could not be divulged without detriment to the public interests, was in compliance with the law.

Held, that while the sufficiency of the return of a contract by the Secretary of the Navy is not a question of law arising in the administration of the Department of the Interior, and therefore is not one upon which the Attorney General is required to render an opinion, it is proper that the Secretary of the Interior should be advised whether the case submitted presents a violation of the statute, since it is his duty to call apparent violations of the statute to the attention of the Department of Justice. *Held further*, that in making the return of a contract on behalf of the Government, as provided for in sections 3744 and 3745 of the Revised Statutes, it is not required to accompany such contract with copies of plans that are confidential and can not be divulged without detriment to the public interests, and the affidavit may except such plans from the return.

(29 Op. Atty. Gen., 293, Jan. 17, 1912.)

EIGHT-HOUR DAY: Subcontractors.

The naval appropriation act of March 4, 1911 (36 Stat., 1287-88), makes appropriation for submarine torpedo boats and for the construction and machinery of vessels, and provides that no part of said

appropriations shall be expended for the construction of any boat or for the construction of any battleship "by any person, firm, or corporation which has not, at the time of the commencement and during the construction of said vessels, established an eight-hour working day for all employees, laborers, and mechanics engaged or to be engaged in the construction of the vessels named herein."

Held that—

The provisions in the naval appropriation act of March 4, 1911 (36 Stat., 1288), relating to an eight-hour workday for employees engaged in the construction of the vessels therein authorized, are not limited to the employees of contractors, but apply to employees of subcontractors engaged in the actual construction of said vessels.

Under the eight-hour restrictions of said act, the person, firm, or corporation actually constructing any of the vessels therein specified must establish an eight-hour workday for all of its employees engaged in making any of the parts of the vessel and in assembling those parts upon their completion.

These eight-hour restrictions prohibit the working of employees more than eight hours a day in the construction of said vessels and their machinery, and they can not be nullified by permitting the employees by contract with their employers to work overtime for additional compensation.

(29 Op. Atty. Gen., 279, Dec. 21, 1911.)

MILITIA: Acceptance of office in National Guard of a State by an officer on the active list of the Regular Army.

Section 1222, Revised Statutes, provides:

"No officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall be thereby vacated."

Upon an application by the Secretary of War for an opinion upon the question, whether an officer on the active list of the Regular Army may accept the office of colonel in the National Guard of the State of Massachusetts without violating the provisions of section 1222 of the Revised Statutes, and without incurring the penalties named therein—

Held, that an officer on the active list of the Regular Army may accept the office of colonel in the National Guard of a State without violating the provisions of section 1222 of the Revised Statutes. But added, that whether the acceptance by an officer of the Army of an office in the National Guard of a State would be inconsistent with the policy expressed in the Constitution and laws of the United States with respect to these two establishments, and whether there are not reasons other than those contained in section 1222 of the Revised Statutes which would make it illegal or improper for an officer of the Army to subject himself to conflicting State jurisdiction, are matters upon which he expresses no opinion.

(29 Op. Atty. Gen., 298, Jan. 31, 1912.)

MILITIA: Authority of the President to send outside of the United States.

The Constitution, which enumerates the exclusive purposes for which the militia may be called into the service of the United States, affords no warrant for the use of the militia by the General Government except to suppress insurrection, repel invasions, or to execute the laws of the Union, and hence the President has no authority to call forth the organized militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation.

(29 Op. Atty. Gen., 322, Feb. 17, 1912.)

OFFICERS OF THE ARMY: Appointment; commission issued in the name of a deceased person.

Capt. John T. Haines became entitled by seniority to promotion to the grade of major of cavalry March 3, 1911, was nominated to the Senate by the President on May 4, 1911, for promotion, and the nomination was confirmed May 15, 1911. He had died May 11, 1911. *Held*, that a commission as major of cavalry can not be lawfully issued in the name of an officer of the Army whose death occurred after he was nominated to that grade by the President but prior to the time the nomination was confirmed by the Senate. It is essential to the creation of such office that there should be an appointment by the President, in addition to a nomination to, and consent by, the Senate.

(29 Op. Atty. Gen., 254, Sept. 22, 1911.)

TAXATION: Philippine customs stamp tax; Government property.

Section 284 of act No. 355 of the Philippine Commission, as amended (Sec. 1660 of the Compiled Acts of the Philippine Commission of 1907), provides that certain shipping documents relating to goods imported into said islands shall not be issued, received, granted, or recognized unless there shall be attached thereto certain customs stamps, as specified in the act, of denominations of from 40 cents to \$4. Philippine currency, according to the character of the instrument, the size of the vessel, or the value of the goods involved. This stamp was demanded for the entry of certain goods belonging to the United States imported into the Philippine Islands for the use of the Army. *Held*, that the stamp is a tax and not a reimbursement for services performed, and that so far as the act in question covers goods of the United States imported into the islands, it is illegal and void as being beyond the competency of the Philippine Government.

(Op. Atty. Gen., June 8, 1912.)

WAR: Neutrality; importation of arms and ammunition; words and phrases.

The words "arms or munitions of war," within the meaning of the joint resolution of March 14, 1912, authorizing the President by proclamation to prohibit the export of arms or munitions of war to

any American country in which conditions of domestic violence are found to exist, embrace weapons used for the destruction of life, together with ammunition and equipment useful in connection with them, and explosives and other equipment of a military character, or articles used for the construction of such equipment.

(29 Op. Atty. Gen., 375, Mar. 25, 1912.)

DECISIONS OF THE COURTS.

CONTRACTS: Acceptance of bids; alternative bids.

The Government advertised for bids to be submitted upon two alternative plans for the construction of certain public works and notified the bidder upon both plans that it would accept its bid, with the proviso that six months should elapse within which to decide between the two plans. The bidder had given the usual bond conditioned for entering into the contract within 60 days after the opening of the bids. After the expiration of said period of 60 days the Government notified the bidder that it would accept the bid upon one of the plans specified, but the bidder refused to enter into a contract. *Held*, that the Government having accepted a bond limiting the period of acceptance to 60 days, it can not now claim that it had more than 60 days in which to elect to accept or reject the bid, and that the acceptance, with the proviso that it would take six months within which to decide which of the two plans it would adopt, was not such an acceptance of the bid as required.

(Judge Lacombe on motion to dismiss complaint in the case of *United States v. Carlin Construction Co. and the Illinois Surety Co.*, United States District Court, Southern District of New York, May, 1912.)

CONTRACTS: Cost of work; extra work.

The Secretary of the Interior entered into a contract for the construction of a dam and irrigation works for the Huntley reclamation project in the State of Wyoming, said contract providing for payment for certain extra work at the necessary cost thereof plus 15 per cent. The contractor, in the performance of such work, incurred expenses for the insurance of employees against liability for accidents and claimed this as a part of the necessary cost of the work, together with the depreciation of his plant. *Held*, that while ordinarily expenses for the insurance of men and the depreciation of a plant are included in a contractor's bid, and, as respects the work covered by the specifications, apply in this contract, the cost of the work not so included should include such expenses as a part of the "actual necessary cost thereof."

(*Lovell v. United States*, Court of Claims, Apr. 8, 1912, No. 30359. Reversing 14 Comp. Dec., 297.)

CONTRACTS: Warranty of existing conditions; excuses for delay in completing contract.

A contract providing for the repair of a dam required the excavation of material immediately above the dam. The printed specifica-

tions stated that the dam was "backed up for about 50 feet with broken stone, sawdust, and sediment to a height of within 2 or 3 feet of the crest." The specifications further stated that each bidder was expected to visit the site of the work and ascertain the nature thereof and obtain information necessary to enable him to make an intelligent proposal. After work was begun it developed that the space above the dam was occupied by the cribwork of an old dam, instead of by the material stated in the specifications. *Held*, that the cost of additional inspections for the period of delay occasioned by the extra time required for removing the cribwork of the old dam should be charged against the contractor, since the statement in the specifications of the character of the material back of the dam did not amount to a warranty, because the bidder had been invited to inspect the work before submitting his proposal.

(*Hollerbach & May v. United States*, Court of Claims, No. 29952, Feb. 12, 1912.)

INDIANS: Introducing intoxicating liquors into the country formerly comprising the Indian Territory.

Before the admission of Oklahoma as a State, the act of March 1, 1895 (28 Stat., 697), forbade the manufacture or sale in or the introduction into the Indian Territory of intoxicating liquors. General statutes forbade the introduction of any such liquors into the Indian country or the sale thereof to the Indians. The enabling act under which the State constitution of Oklahoma was formed and the State admitted into the Union provided also against the introduction of such liquors into the original limits of the Indian Territory from other points within the State, and preserved the jurisdiction of Congress over the Indians and their lands. *Held*, that the act of March 1, 1895, is still in force as a Federal statute, and a person who ships intoxicating liquors from an adjoining State into the limits of the Indian Territory, as it formerly existed, although to that portion of it where the Indian title has been extinguished, violates the provisions of said act, and the district court of the United States has jurisdiction to punish him for such violation.

(*In re Webb*, Decision of U. S. Supreme Court, June 10, 1912.)

PATENTED INVENTIONS: Use of by United States.

On June 8, 1907, the Fried Krupp Co., a corporation, organized under the laws of the German Empire, brought suit in the Supreme Court of the District of Columbia against the Chief of the Ordnance Department of the United States Army to enjoin him from manufacturing and using certain improvements in guns and gun carriages, which the complainant claimed were covered by United States patents owned by it. It was admitted that the defendant was the Chief of Ordnance of the United States Army; that field guns and gun carriages embracing the improvements in question were being manufactured and would continue to be manufactured for the use of the Ordnance Department of the United States; and that the defendant derived no profits therefrom. A demurrer to the bill was sustained and

the same dismissed, but the Court of Appeals reversed the decision and remanded the case for further proceedings, and the case was then removed by *certiorari* to the Supreme Court of the United States. *Held*, that since the act of June 25, 1910 (36 Stat., 851), providing that when an invention secured by letters patent is used by the United States without the license of the owner the latter may recover reasonable compensation therefor in the Court of Claims, a suit for an injunction will not lie against an officer of the United States manufacturing or using such patented invention for the Government, the law having thus provided a method whereby the owner may obtain compensation.

(*Fried Krupp Co. v. Crozier*, U. S. Supreme Court, Apr. 8, 1912.)

TRANSPORTATION: Government bill of lading; loss occasioned by unprecedented flood.

A quantity of books were shipped on a Government bill of lading and destroyed by the unprecedented floods of 1903 in Kansas City, Mo., while in possession of the transportation company. Their value was deducted, in making settlement, from sums admitted to be due to said company. The bill of lading contained no special contract of exemption of the carrier from its general liability, and the usual freight rate was charged. *Held*, that the loss was occasioned by one of the two instrumentalities excepting common carriers from their general liability as insurers of goods while in transit, to wit, the act of God and the public enemy, and that the company was not responsible for the loss and is entitled to judgment for the amount retained.

(*Missouri Pacific Railway Co. v. United States*, Court of Claims, No. 30040, Feb. 12, 1912.)

BULLETIN 20.

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WAR DEPARTMENT,
WASHINGTON, October 19, 1912.

The following digest of opinions of the Judge Advocate General for the period from July 1 to September 30, 1912, inclusive, and digest of decisions of the Comptroller of the Treasury and opinions of the Attorney General are published for the information of the service in general.

[1931376 A—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

W. W. WOTHERSPOON,
Major General, Acting Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ABSENCE: Leave of; employees at the West Point, N. Y., Military Academy; laws relating to leaves of absence for employees in gun factories and arsenals.

The act of February 1, 1901 (31 Stat., 746), authorizes fifteen days of annual leave with pay, under the conditions specified therein, for "each and every employee of the navy yards, gun factories, naval stations, and arsenals of the United States," and the act of March 3, 1909 (35 Stat., 755), provide for "leave of absence not to exceed fifteen days in any one year, which leave may, in exceptional and meritorious cases, where such an employee is ill, be extended, in the discretion of the Secretary of the Navy, not to exceed fifteen days additional in any one year," for per diem employees forming part of the "clerical, drafting, inspection, and messenger force at the navy yards, naval stations, and other stations and offices under the Naval Department," *Held*, that while the statutes are very comprehensive as to certain employees of the Navy Department in respect to leave of absence, the provision for such leave to similar employees in the War Department is limited to those engaged in "gun factories" and "arsenals" mentioned in said act of February 1, 1901, and that per diem employees of the Military Academy do not come within the act and there is no authority for the allowance to them of leave of absence with pay. They can only be paid for the days they work and can not be allowed leave with pay for Saturday afternoons for the months of July, August, and September.

(2-153, July 13, 1912.)

ABSENCE WITHOUT LEAVE: Arrest and confinement by civil authorities; condonation of offense and discharge.

A soldier was arrested by the civil authorities, charged with seduction. After his arrest he married the girl whom he was charged with seducing, which fact under the law of the State could be pleaded in bar of the prosecution for seduction, and he was consequently discharged without trial.

Paragraph 1394, Army Regulations, 1910, provides that—

“Officers and enlisted men in arrest and confinement by the civil authorities will receive no pay for the time of such absence; if released without trial, or after trial and acquittal, their right to pay for the time of such absence is restored.”

Held, that while the soldier came within the strict language of the regulation he did not come within its meaning. Through his own fault he has not rendered the services contemplated by his contract of enlistment and his marriage to the girl after his arrest is not evidence of his innocence, but rather an admission of his guilt. His absence following such arrest and until his restoration to duty should be considered as absence without leave for which he is not entitled to pay.

(72-211, Sept. 16, 1912.)

ABSENCE WITHOUT LEAVE: Making good time lost.

On consideration of the question of making good time lost by absence without leave and consequent confinement therefor awaiting trial and in serving sentences. *Held*, that time spent in confinement awaiting trial and serving sentence for the offense of absence without leave during the period of a soldier's enlistment is not time required to be made good by the act of May 11, 1908 (35 Stat., 109), or by paragraph 130, Army Regulations, 1910, interpreting the law. *Held further*, that if the end of a man's enlistment finds him with time to be made good by reason of such unauthorized absence, and he is then in confinement awaiting trial or serving sentence because of said absence, his service to make good time lost does not begin to run until he is released from confinement.

(2-234, Sept. 9 and 10, 1912.)

APPROPRIATIONS: Lease of public building by one department to another; works of improvement or repair.

A building belonging to the Treasury Department is leased by the War Department, and it is desired to install a window therein for the benefit of such use by the War Department. *Held*, that this is an improvement or betterment of the building and not a repair, and that there is no appropriation of the War Department that can be used for the installation of said window; but *advised* that the same might be arranged for as a part of the rental and the installation made at the expense of the appropriation from which the rental is paid.

(5-111, Aug. 19, 1912.)

ARMY: Organization of; detail as principal assistant to Chief of Bureau of Insular Affairs.

An officer was detailed as assistant to the Chief of the Bureau of Insular Affairs, War Department, pursuant to the provisions of the act of March 2, 1907 (34 Stat., 1162), which act provides that the provisions of section 27 of the act of February 2, 1901 (31 Stat., 755), with reference to the transfer of officers of the line to the departments of the staff for tours of service, shall apply to the vacancy created by said detail and the return of said officer to the line. *Held*, that as the detail was made pursuant to said act of March 2, 1907, which makes no mention of the length of the detail, and not under section 26 of said act of February 2, 1901, which provides for details of four years' duration, the term of the detail is not limited to four years, and that the officer so detailed did not by operation of law become a supernumerary officer of the line at the expiration of four years from the date of his detail.

(14-123.8, Aug. 13, 1912.)

ARMY: Use of officers of in the reorganization of the Panama police force.

Upon request by the Secretary of War for an opinion as to the advisability of reorganizing the police force of Panama under the supervision of officers of the Army of the United States, in view of the reported condition of police affairs in the cities of Colon and Panama. *Held*, that the President, in his discretion and without the consent of Congress, and acting under Article VII of the treaty with Panama of November 18, 1903 (33 Stat., 2234), may order such officers of the Army as he deems proper to the cities of Colon and Panama and to points within the territories and harbors adjacent thereto, to maintain order, and for this purpose to reorganize the Panama police force or take such other steps as may be necessary to carry out the purposes of the President: *Provided, however*, that such officers shall be and remain at all times solely under the authority of the United States. *Held further*, that the President may not, without the consent of Congress, detail officers of the Army to serve under the Republic of Panama for the purpose of reorganizing the police force or for any other purpose.

(92-500, Aug. 19, 1912.)

ARMY BANDS: Use of during sessions of the International Congress of Hygiene and Demography.

On application for the services of the Engineer Band and the Fort Myer Band for the XVth International Congress on Hygiene and Demography, *Held*, that while bands of the Army may be ordered to furnish music as a duty devolving upon them, the propriety of their use under any given conditions is to be determined by the military authority having power to issue the necessary orders. *Held further*, that under the act of May 11, 1908 (35 Stat., 110), Army bands or members thereof stationed in or near Washington may not supply music for hire within the District of Columbia if they come into competition with other musicians.

(8-400, Sept. 4, 1912.)

ARMY TRANSPORTATION: Sleeping-car accommodations for enlisted men.

A private soldier traveling under orders alone was furnished by the depot quartermaster with tourist sleeping-car accommodations, but with first-class ticket transportation, second-class tickets between the points of travel not being obtainable. Paragraph 1143, Army Regulations, 1910, provides that—

"Tourist sleeping cars will be provided for troops on the basis of three men to a section when the journey involves spending a night on the train; but when the number of troops is too small to justify the hiring of tourist sleepers, second-class transportation with tourist sleeping-car accommodations on the same basis may be furnished. When the number is less than three, each man will be furnished with a berth."

A letter of the Quartermaster General subsequent to the furnishing of the transportation interpreted this regulation to mean that no sleeping-car accommodations could be furnished enlisted men except where second-class transportation was also furnished. *Held*, that tourist sleeping-car accommodations may be obtained where available, even though second-class transportation can not be purchased for the same journey, and also that if sleeping-car accommodations to which a soldier may not be entitled are actually furnished to and used by him the cost thereof can not be charged against the soldier. (94-240, Sept. 9, 1912.)

ASSOCIATIONS: Expenses of an officer detailed to attend the meetings of the International Eugenics Congress. Section 8 of act of June 26, 1912.

Section 8 of the act of June 26, 1912 (Public No. 201), provides—

"No money appropriated by this or any other Act shall be expended for membership fees or dues of any officer or employee of the United States or of the District of Columbia in any society or association or for expenses of attendance of any person at any meeting or convention of members of any society or association, unless such fees, dues, or expenses are authorized to be paid by specific appropriations for such purposes or are provided for in express terms in some general appropriation."

It was proposed to detail an officer of the Medical Corps of the Army to attend the International Congress of Eugenics to be held in London, England, during the month of July, 1912. *Held*, that the International Congress of Eugenics is a society or association within the meaning of the law and that the expenditure of any money appropriated for public purposes for the expenses of an officer of the Army detailed for attendance upon such Congress is forbidden.

(94-210, July 3, 1912.)

NOTE.—Section 10 of the Sundry Civil Act approved August 24, 1912 (Public No. 302), postpones the operation of section 8 of the act of June 26, 1912, *supra*, during the fiscal year 1913, except to the extent that it prohibits the payment of membership fees or dues, but requires written authorization from heads of departments for incurring expenses of attendance upon meetings of members of any society or association.

ASSOCIATIONS: Attending meetings of business associations; payment of membership dues in the International Association of Chiefs of Police.

Section 8 of the act approved June 26, 1912 (Public No. 201), appropriating for the expenses of the District of Columbia provides:

"No money appropriated by this or any other Act shall be expended for membership fees or dues of any officer or employee of the United States or of the District of Columbia in any society or association or for expenses of attendance of any person at any meeting or convention of members of any society or association, unless such fees, dues, or expenses are authorized to be paid by specific appropriations for such purposes or are provided for in express terms in some general appropriation."

Upon consideration of the question as to whether or not said law operates to prevent the payment of traveling expenses of employees of the Quartermaster's Department in attending meetings of trans-continental passenger associations, tariff classification committees, associations or committees having to do with marine matters, or associations or committees in connection with heating, lighting, and sewerage problems, etc. *Held*, that the law was not intended to limit the means or methods employed by the Government in the exercise of its functions (Dec. Comp. Treas., July 20, 1912), and that associations of the character named, so far as they relate to the business of the Government, do not come within the meaning of the law, and the expenses of officers or employees of the Government in attending upon such meetings as are necessary or proper in connection with the transaction of the Government business may be paid. *Held further*, that a membership fee in the International Association of Chiefs of Police for The Adjutant General may be paid if necessary or proper in procuring information concerning probable deserters or escaped military prisoners.

(94-210, July 25, 1912.)

NOTE.—The operation of section 8 of the act of June 26, 1912, *supra*, was in part postponed by section 10 of the Sundry Civil Act of August 24, 1912 (Public No. 302), during the fiscal year 1913.

AVIATION CORPS: Flight on Labor Day without orders; line of duty.

On consideration of the question as to whether an officer detailed to the Aviation Corps, permitted but not ordered to make a flight on Labor Day, on the occasion of a celebration of the day by labor organizations, if sustaining an accident during such flight, the accident would be in the line of duty. *Held*, that it is the duty of the officer under his detail to make practice flights to fit himself for the service and to advance the science and art of aviation in its relation to the military service, and that the fact that the particular flight is not ordered but only permitted, or that it is made on the occasion of the labor celebration, should not be regarded as taking the officer out of the line of duty.

(54-020, July 24, 1912.)

CERTIFICATE OF MERIT: Time of making recommendation therefor; pay under subsequent enlistment.

A soldier performed an act of meritorious service for which the captain of his company recommended that he be granted a certificate

of merit in pursuance of section 1216, Revised Statutes. The recommendation was approved by the officer commanding his regiment while the soldier was still in the service, but said officer was not in actual command at the time of the performance of the meritorious act. The papers were forwarded to Washington for official action but were returned for the approval and recommendation of the officer commanding the regiment at the time the meritorious service was performed. This officer returned the papers with his approval and recommendation that a certificate of merit be granted, but before final action could be taken the soldier had left the service and the certificate was not granted. The soldier reenlisted after more than three months and is now in the service. Section 1216, Revised Statutes, as amended by the act of March 29, 1892 (27 Stat., 12), provides—

“When any enlisted man of the Army shall have distinguished himself in the service the President may, at the recommendation of the commanding officer of the regiment or the chief of the corps to which such enlisted man belongs, grant him a certificate of merit.”

Held, that under said statute the commanding officer of the regiment or the chief of the corps to which the enlisted man belongs must make such recommendation before the soldier leaves the service, but this commander need not be the one in actual command at the time the meritorious service was performed.

Held further, that under the act of February 9, 1891 (26 Stat., 737), a soldier reenlisting is entitled to receive the additional pay carried by the certificate of merit earned in a former enlistment, notwithstanding that such service may not be continuous.

(46-200, Aug. 20, 1912.)

CLERKS AND EMPLOYEES: Clerk in the Subsistence Department at large; admission to the Government Hospital for the Insane after discharge.

A clerk in the Subsistence Department of the Army at large was granted a 30 days' leave of absence and before its expiration became insane and was admitted to a hospital for the insane for treatment. Afterwards he was granted a leave of absence without pay and thereafter discharged. When discharged he was still insane and under treatment at a State institution. *Held*, that as the clerk became insane while in the Government employ, the Secretary of War might, in his discretion, under section 4843, Revised Statutes, order his admission to the Government Hospital for the Insane, the fact of his having been discharged not being a bar to such admission.

(44-120, Sept. 5, 1912.)

CLERKS AND EMPLOYEES: Member of the Militia of the District of Columbia; leave of absence.

A clerk who belonged to the National Guard of the District of Columbia was temporarily employed to fill a vacancy in the office of the Chief of Engineers pending action on the legislative, executive, and judicial appropriation bill for the fiscal year 1913. On consideration of the question of his right to leave of absence to attend an encampment of said National Guard under section 49 of the act of March 1, 1889 (25 Stat., 779), which provides that

"All officers and employees of the United States and of the District of Columbia who are members of the National Guard shall be entitled to leave of absence from their respective duties, without loss of pay or time, on all days of any parade or encampment ordered or authorized under the provisions of this act."

Held, that said employee was entitled to such leave of absence.
(58-811, Aug. 14, 1912.)

CLERKS AND EMPLOYEES: Pay of during suspension for insubordination.

A clerk of Class I, in the Adjutant General's Office, was orally suspended from duty for insubordination, and afterwards his resignation was accepted. He performed no duty after the date of his suspension. *Held*, that a clerk in an executive department, although held to be an officer of the United States for certain purposes, may be suspended for cause by the authority appointing him and is not entitled to pay during the period of such suspension.

It appearing that the Secretary of War had not officially acted upon the matter of suspension. *Held further*, that he may now do so, and if he approves the suspension, the clerk is not entitled to pay subsequently to his suspension; otherwise, if he disapproves the same.

(16-200, Sept. 9 and 13, 1912.)

CONTRACTS: Competition useless; supplemental contract with original contractor.

Congress authorized the modification of a project for an improvement of a navigable water under contract, the modification consisting in the cutting off of bends and the widening of the channel, all within the expenditure originally authorized. The facts indicated that the price at which the work is done under the existing contract is less than what could be obtained if bids were invited for the additional work separately, and that the introduction of a new contractor would create complications which it would be very desirable to avoid. *Held*, that the case should be regarded as one where competition would be useless and the work as a proper one for a supplemental contract with the existing contractor.

(76-124, Aug. 19, 1912.)

CONTRACTS: Penalty for delay in performance; actual damages.

A contract was made for the repair of a Government steamer, providing that the work should be completed within six working days and that the United States might, "in the discretion of the Quartermaster General, exact a penalty of \$25 per day for each and every calendar day the work is delayed beyond the date fixed by the contract for completion." The contractor failed to complete the repairs within the time limit. *Held*, that the contract provided for a penalty and not for liquidated damages, and that the Quartermaster General might exact such less sum per day as he should find sufficient to cover the actual damages to the United States by reason of the contractor's default in not completing the work within the stipulated time.

(76-410, July 26, 1912.)

CONTRACTS: Public buildings; architects employed under the authority of appropriations.

Appropriations were made under the act of June 30, 1902 (32 Stat., 512, 519), for the construction of buildings for the Engineer School and the Army War College at Washington Barracks, D. C., and subsequent appropriations were made for their completion, increasing the cost. The only authority to make contracts with the architects was contained in the said act of June 30, 1902. Under a contract made in pursuance of said act for architectural service, *Held*, that where the only power to enter into a contract arises from the existence of an appropriation sufficient to cover the amount contracted for, the power to contract is limited by the appropriation, and that a contract for a larger amount than that appropriated for is void, even though the contract expressly provided that it should be contingent upon future appropriations.

The contracting architects in this case were allowed to continue their work under subsequent appropriations. *Held*, that such employment was on a *quantum meruit* basis and not under their contract, and that the architects have no rights under their contract to be employed as such in the erection of buildings authorized by the subsequent act of July 25, 1912 (Public No. 241), providing for the construction at the Engineer School of a building with library accommodations and other facilities for the instruction of officers of the Engineer Corps in duties pertaining to the improvements of rivers and harbors, or any future buildings constructed at the Washington Barracks.

(76-012, Aug. 12, 1912.)

CONTRACTS: Public works; section 3717, Revised Statutes; separate agreements.

Bids were invited and received for the repair of five harbor boats stationed at a fort, and two bids were low for certain portions of the work. Section 3717, Revised Statutes, provides:

"Whenever the Secretary of War invites proposals for any works, or for any material or labor for any works, there shall be separate proposals and separate contracts for each work, and also for each class or material or labor for each work."

On consideration of the question of whether it would be a violation of this section to execute only two contracts for the whole work, including in each contract repairs on two or three boats, or whether it would be necessary to make separate contracts for the repair of each boat. *Held*, that there is no reason why more than one boat might not be included in a single contract provided the boats are all at the same place and the repairs fall within the same class of material or labor.

(76-350, July 29, 1912.)

Similarly *held* that separate agreements were not necessary for the work of painting hospital buildings at different posts, as this is a work of repair and not one of construction of a public work.

(76-350, Aug. 27, 1912.)

COURTS-MARTIAL: Theft of a blanket by one soldier from another; Articles of War.

The 60th Article of War provides for the punishment of any person in the military service of the United States—

“Who steals, embezzles, knowingly and wilfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or intended for the military service thereof;”

The 62d Article of War provides for the punishment of all crimes, not capital, which officers and soldiers may be guilty of to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war. *Held*, that as blankets are now issued, not as a part of the soldier's clothing allowance, but as equipage, which is placed in the soldier's possession for use while in the service, and is retained by the Government when he is discharged, prosecutions for the theft of such articles by one soldier from another should be brought under the 60th Article of War, except in cases where the blankets were issued under the old system as part of the soldier's clothing allowance, when the charge should be laid under the 62d Article of War; but if the charge is laid under either article it would be lawful.

(10-186.5, Aug. 6, 1912.)

DAMAGES: Torts of Government agents; failure to keep walk in repair.

A party injured by being tripped on a loose plank, alleged to have been negligently allowed to get loose in the sidewalk on the Government Military Reservation at Fort Niagara, N. Y., is not entitled to damages on account thereof from the United States. The Government is not liable for any damages arising from torts or neglects of its officers unless it specifically assumes such liabilities.

(18-320, Aug. 3, 1912.)

DESERTERS: Reward for apprehension and delivery of; serving in the Navy or Marine Corps.

Rewards for the apprehension, securing, and delivery of deserters from the Army, not to exceed \$50 for each one, are provided for by annual appropriation acts. Paragraph 121, Army Regulations, 1910, provides among other things that—

“No reward will be paid in the case of a deserter or of an escaped military prisoner who is serving in the Army, Navy, or Marine Corps.”

Held, that the discretion of the Secretary of War in offering rewards for the apprehension, securing, and delivery of deserters from the Army is exercised by said paragraph of the Army Regulations, and a soldier deserting from the Army and enlisting in the Navy, comes clearly within the provisions of said regulation and no reward can be paid for his apprehension and return to the Army as a deserter.

(26-312.2, Sept. 12, 1912; 26-312.3, Aug. 8, 1912.)

DISCHARGE: Enlisted man discharged because of dependent foster parent.

Section 30 of the act of February 2, 1901 (31 Stat., 756), provides for the honorable discharge of a soldier upon his own application, after one year's service, "should either of his parents die leaving the other solely dependent upon the soldier for support." A soldier, with the consent of his natural parents, had actually been adopted by a man and wife when sixteen months of age, and remained with them until he was twenty-five years of age, although no decree of adoption had been issued by a court. *Held*, that he was entitled to his discharge, upon his own application, after one year's service, upon the death of one of such foster parents leaving the other in destitute circumstances and dependent upon him for support.

(28-221, Sept. 27, 1912.)

DISCIPLINE: Articles of War; charging a soldier with failure to produce at inspection clothing previously issued.

A soldier was charged with the failure to account at inspection for sundry articles of clothing issued to him by the United States. *Held*, that if the soldier was merely unable to produce the articles of clothing, and if no evidence is available of his having sold the same or lost them through neglect, the only offenses made punishable under the 17th Article of War, it would be lawful to charge the soldier either under the 60th or 62d Article of War, according to the nature of the case.

(30-211, Aug. 26, 1912.)

DISCIPLINE: Confinement of military prisoners in the Canal Zone Penitentiary; appropriation chargeable with the expense.

Upon request that arrangements be made with the Isthmian Canal Commission whereby military prisoners sentenced to confinement in the penitentiary may be confined in the penitentiary of the Canal Zone. *Held*, that the act of the Isthmian Canal Commission of September 2, 1904, is broad enough to authorize the receipt and detention of military prisoners at the Canal Zone penitentiary, if the penitentiary is properly designated, and that there is no legal objection to making the arrangements as requested. The expense of maintenance of said prisoners would be a proper charge against the appropriation for "contingencies of the army."

(92-500, Sept. 16, 1912.)

EMPLOYEES: Compensation for injury of, while in the service of the United States.

A quarryman employed by the quartermaster at West Point, N. Y., was injured while so employed by a large block of stone falling upon him, by reason of which he was confined to the hospital for about two weeks. The act of May 30, 1908 (35 Stat., 556), provides for compensation to artisans or laborers in the United States' employ for injuries sustained by them in the course of their employment "in any of its manufacturing establishments, arsenals, or navy yards, or in the construction of river and harbor or fortification work or in the hazardous

employment on construction work in the reclamation of arid lands or the management or control of the same, or in hazardous employment under the Isthmian Canal Commission."

Held, that the law does not include employment by the Quartermaster's Department at a military post, and that the person injured in this case is not entitled to compensation under the provisions of said act.

(18-330, Sept. 5, 1912.)

EMPLOYEES: Payment of, from lump-sum appropriations; Acts of August 26, 1912, and August 23, 1912.

Section 7 of the Deficiency Appropriation Act of August 26, 1912 (Public No. 340), provides that

"No part of any money contained herein or hereafter appropriated in lump sum shall be available for the payment of personal services at a rate of compensation in excess of that paid for the same or similar services during the fiscal year nineteen hundred and twelve; nor shall any person employed at a specific salary be hereafter transferred and hereafter paid from a lump-sum appropriation a rate of compensation greater than such specific salary, and the heads of departments shall cause this provision to be enforced."

A similar provision is found in section 3 of the Legislative, Executive, and Judicial Appropriation Act of August 23, 1912 (Public No. 299), except that said act refers only to lump-sum appropriations contained therein.

Held, that while said legislation prevents an increase of the compensation of employees paid from such lump-sum appropriations above the amounts paid for the same or similar services during the fiscal year 1912, it does not prevent the promotion of such employees from one class or position to another in a classification designed to indicate the different degrees of experience or efficiency. *Held further*, that while the first part of the law of August 26, 1912, relating to increase in compensation applies only to the appropriations contained in the act and to similar appropriations thereafter made, the second portion applies to all such appropriations whenever made. (Decs. Comp. of Treas., Sept. 5 and 9, 1912.)

(5-075, Sept. 19, 1912.)

ENLISTED MEN: Absence without leave; detained by civil authorities.

A soldier while absent without leave was detained for about ten days serving sentence imposed by civil authorities. Upon release and before he had had an opportunity to return to his station he was re-arrested, and upon trial one week later was acquitted. *Held*, that having incurred the status of absence without leave through his own fault, such status continued during the period of his second confinement although he was subsequently acquitted of the cause which led to such confinement.

(2-230, July 30, 1912.)

ENLISTED MEN: Disposition of the effects of deceased soldier; jurisdiction.

A retired enlisted man died at a post hospital on a military reservation over which exclusive jurisdiction has been ceded to the United

States, leaving money and other personal property in the possession of the hospital authorities and also a will disposing of the same. *Held*, that in carrying out the provisions of paragraph 162, Army Regulations, 1910, the proper procedure would be to notify the legatees under the will that the effects of the deceased soldier will be turned over to the legal representative appointed by the court of the domicile of the deceased, and that if no application be made therefor within a reasonable time the same will be disposed of as provided in the Army regulations.

(10-210, Aug. 9, 1912.)

ENLISTMENT: Second enlistment of deserter; discharge from first enlistment and holding him to the second.

Where a deserter serving in a fraudulent enlistment is placed in confinement by the military authorities charged with desertion from a prior enlistment and fraudulent enlistment while in desertion. *Held*, that such confinement constitutes a decision on the part of the military authorities to consider the soldier as in his first enlistment and amounts to a suspension of service under his second enlistment.

The soldier, while undergoing confinement, under sentence for the desertion and fraudulent enlistment, was discharged without honor from his first enlistment and held to his second. *Held*, that time thereafter spent in confinement for the desertion and fraudulent enlistment counted on his second enlistment.

(34-310, Aug. 5, 1912.)

GOVERNMENT AGENCIES: Barber shops, billiard and pool tables; Dig. Op. J. A. G., 1912, Government Agencies, VII, corrected.

General Orders, No. 28, W. D., February 28, 1911, provides that "The establishment of company barber shops and of company billiard and pool tables from which revenues may be derived, is authorized. All funds accruing therefrom will be accounted for as part of the company fund."

Held, that the effect of the above order was not to make the barber shop and billiard and pool tables governmental agencies to the extent that would permit the stoppage of a soldier's pay to meet his obligations thereto.

(C. 23694, June 27, 1911.)

GOVERNMENT HOSPITAL FOR THE INSANE: Admission of an enlisted man to; legal residence.

A man enlisted in the coast artillery corps at Baltimore, Md., giving that State as his legal residence, and later was admitted to a post hospital and his case diagnosed as melancholia. Later he was discharged on surgeon's certificate of disability, "not incurred in line of duty," and turned over to the officer on duty at the central police station at Baltimore. He had previously served an enlistment in the navy when he gave his residence as Baltimore County, Maryland. Upon application by his mother to have him admitted to the Gov-

ernment Hospital for the Insane. *Held*, that a soldier does not lose his legal residence by absence in the service of the United States and that the man should still be considered as a resident of the State of Maryland. Being such resident the obligation to support him rests with the authorities of that State and no further action should be taken by the War Department. C. 19208, July 25, 1910.
(44-100, Aug. 9, 1912.)

GOVERNMENT HOSPITAL FOR THE INSANE: Admission of a member of the family of an officer to.

Where inquiry was made as to whether the widow of an officer of the Army might be admitted to the Government Hospital for the Insane. *Held*, that the hospital exists as set forth in section 4838, Revised Statutes, for the care and treatment of the insane of the Army and Navy and of the District of Columbia; that section 4843, Revised Statutes, as amended, restricts patients from the Army to certain distinct classes of persons, which do not include the family of an officer; and that, therefore, the widow of an officer, as such, is not entitled to enter as a patient the hospital in question.

(44-134, July 24, 1912.)

INTOXICATING LIQUORS: Introduced into the old Indian Territory.

The modified authority granted to the War Department under section 2139, Revised Statutes, as amended, to grant permits for the introduction of intoxicants into the Indian country in certain cases, has been nullified by section 3 of the enabling act of the State of Oklahoma approved June 16, 1906 (34 Stat., 269), in so far as it regards the old Indian Territory, the Osage nation, and any other parts of the State which existed as Indian reservations on January 1, 1906. While under the above section of the Revised Statutes the War Department granted at times permits for the introduction of intoxicants into the Indian country, it was only where cases were presented requiring wine or alcohol for the use of hospitals, in rare cases for individual patients, and where wine was needed for sacramental purposes. The War Department has never granted permits for the introduction of intoxicants for the purpose of sale. The Oklahoma Enabling Act forbids the introduction of intoxicants into the territory above mentioned, except through State agencies established under the laws of the State of Oklahoma.

(48-221, July 13, 1912.)

JUDGE ADVOCATES GENERAL: Digest of opinions of; manner of citing.

In the matter of the manner in which the Digest of Opinions of the Judge Advocates General, edition of 1912, should be cited, *advised* that the same be cited by page, adding the last letter or figure characterizing the particular paragraph on the page to which reference is made. For example, under the head of Discipline on page 535 will be found a paragraph designated as follows: XI A 17 a (2) (a) [1] [e] [A]. This should be cited as "Dig. Op. J. A. G., 1912, p. 535 [A]."

(50-030, Sept. 20, 1912.)

MILITARY ACADEMY: Engineer detachment; status of; act of August 9, 1912.

In construing the provision with reference to the engineer detachment at the United States Military Academy authorized by act of August 9, 1912 (Public No. 253), making appropriation for said institution. *Held*, that said detachment is in excess of the enlisted strength of the engineer corps, and the men composing it make up an organization of their own attached to the Military Academy.

Held further, that the vacancies heretofore kept open in the various engineer companies for the purpose of maintaining the said engineer detachment stand released and may be filled by enlistment.

(8-140, Sept. 4, 1912.)

MILITARY ACADEMY: Engineer detachment; distribution of the profits of the post exchange after the act of August 9, 1912.

General Orders provide that a certain amount of the profits of a post exchange shall be distributed—

"2. Where the members belong to the Corps of Engineers it will be paid to the Engineer Band.

* * * * *

"4. Where the members belong to organizations having no band, it will be paid to the band serving at the post if there be one, otherwise to such members."

The act of August 9, 1912 (Public No. 253, p. 3), appropriating for the Military Academy for the fiscal year 1913, provides that—

"Hereafter there shall be maintained at the United States Military Academy an engineer detachment which shall consist of"—a certain number of noncommissioned officers and privates.

Held, that such detachment, although retaining its character of engineer troops, becomes an independent organization pertaining to the Military Academy alone and removed from the Corps of Engineers as a part of that organization; and, not having a band, its proportion of the profits of the post exchange, coming within the operation of said General Orders, should be paid to the band serving at the post.

(8-140, Aug. 24, 1912.)

MILITARY JURISDICTION: Civil Service employee of the Quartermaster's Department at Fort Bayard, New Mexico.

It was reported that a Civil Service employee employed as a plumber's helper by the Quartermaster's Department at Fort Bayard, New Mexico, was a chronic alcoholic, and when under the influence of liquor was unruly and pugnacious, and was frequently absent from his duties; and further that he had been given a summary punishment of one month's confinement in the guardhouse, being permitted during the day to perform his regular duties as plumber's helper. *Held*, that as he was not an inmate of the hospital at that place, but only a Civil Service employee therein, he did not come within the provisions of the act of June 12, 1906 (34 Stat., 255), providing that all persons admitted to treatment in the general hospital at that post should be subject to the rules and articles for the government of the Army of the United States, and that therefore his summary punish-

ment in the guardhouse was illegal, although he accepted this punishment in preference to having charges preferred against him with a view to his removal from the service.

(16-230, July 15 and Aug. 8, 1912.)

MILITARY RESERVATIONS: Erection of sectarian chapels upon reservations.

Upon application for a site on the military reservation at Fort William McKinley, P. I., upon which to erect a chapel, no mention being made as to whether it was to be used for sectarian or nonsectarian purposes, but the applicant belonging to the Roman Catholic Church. *Held*, following the opinion of the Attorney General of May 8, 1897 (21 Op., 537), in the matter of the contemplated erection of a Catholic chapel at West Point, N. Y., that no authority exists in the Secretary of War to grant a license for the erection of a sectarian chapel upon the military reservation, but that since the passage of the Act of May 31, 1902 (32 Stat., 282), authorizing the Secretary of War to permit the construction of buildings by the Young Men's Christian Association, a license might be given for the construction of a nonsectarian chapel as a place of worship for all denominations.

(80-815, July 26, 1912.)

MILITARY RESERVATIONS: Jurisdiction of the United States over, in New Mexico; taxation of Government agencies.

Upon inquiry as to the legal status of the Fort Bayard Military Reservation in New Mexico. *Held*, that when New Mexico was erected into a State of the Union no reservation was made by Congress of exclusive jurisdiction over the military reservations situated therein, and it follows that the Federal reservations in that State are merely pieces of real estate belonging to the Government and are subject to the laws of the State as is real property of any other owner except, of course, that the State may not interfere directly or indirectly with the operation of the agencies of the United States. *Held further*, that while automobiles used on the reservations by private parties are subject to license and taxation by the State an automobile ambulance belonging to the United States is exempt from taxation. *Fort Leavenworth R. R. Co. v. Lowe* (114 U. S., 525.)

(90-125, Sept. 16, 1912.)

MILITIA: Aids to commanders-in-chief and brigadier generals; unassigned list.

Upon consideration of the question as to whether or not aids can be appointed to the governors as commanders-in-chief of the Organized Militia and to brigadier generals of such service conformably with the provisions of section 3 of the Militia act of January 21, 1903 (32 Stat., 775), as amended by section 2 of the act of May 27, 1908 (35 Stat., 339). *Held*, that aids appointed and commissioned for brigadier generals in the Organized Militia of the same number and grade as authorized by law for officers of corresponding rank in the Regular Army of the United States may be recognized as a part of the Organized Militia, and it is not required that they be

commissioned in any particular line or staff corps, but that no such aids appointed for the commander-in-chief of the militia may be so recognized as the law does not provide for aids to the commander-in-chief of the Army of the United States. *Held further*, that officers appointed in the militia in excess of the requirements of their organizations and not needed for staff duties in connection therewith, can not be recognized as part of the Organized Militia. The additional list of officers in the United States Army authorized for detail to various duties not directly connected with military administration, does not constitute a military organization within the meaning of section 3 of said act of January 21, 1903, and no such body of officers can be recognized as such as a part of the Organized Militia.

(58-213, July 17, 1912.)

MILITIA: Expense of hiring mounts for officers for the purpose of participating in joint maneuvers.

A bill of \$600 was incurred by the State of Missouri in the hire of horses for mounts for officers of the State Militia for the purpose of participating in the joint maneuver campaign in the State of Kansas. *Held*, that the expense of hiring such mounts should be paid from the appropriation accruing to the State under section 1661, Revised Statutes, as amended by the act of June 22, 1906 (34 Stat., 449, 450), and not from the appropriation for "Encampments and Maneuvers, Organized Militia." 18 Comp. Dec., 361.

(58-424, Sept. 18, 1912.)

OATHS: Authority to administer; chief clerks of executive departments and clerks designated by them.

Section 8 of the Sundry Civil Act of August 24, 1912 (Public No. 302), authorizes certain officers and clerks to administer oaths required by law or otherwise to accounts for travel and other expenses against the United States, including "Chief clerks of the various executive departments and bureaus, or clerks designated by them for the purpose." On recommendation of the Chief of Engineers that certain chief clerks and clerks at engineer offices and suboffices of the engineer department at large be designated to administer such oaths. *Held*, that the designation of a clerk in any bureau should be left to the chief clerk of that bureau who may designate one or more clerks of his bureau for this purpose in case he himself does not administer oaths, but there is no authority for the designation of an unlimited number of clerks throughout the United States for that purpose.

(94-420, Sept. 14, 1912.)

OFFICERS AND EMPLOYEES: Teacher of French in the United States Military Academy; oath of office.

Section 1757, Revised Statutes, provides that when any person is elected or appointed to any office of honor or trust under the Government of the United States he shall take an oath providing in part as follows:

"That I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true

faith and allegiance to the same; * * * and that I will well and faithfully discharge the duties of the office on which I am about to enter."

For several years past the annual appropriation acts for the support of the United States Military Academy have contained the following item:

"For pay of two civilian instructors in French, to be employed under rules prescribed by the Secretary of War, \$2,000 each, \$4,000;" and under this authority the Secretary of War has established certain rules, and has employed French citizens as civilian instructors. A French citizen employed as one of such instructors, on taking the oath prescribed by the above section of the Revised Statutes, omitted therefrom the word "allegiance." *Held*, that there is serious doubt as to whether or not the civilian instructor in French at the Military Academy holds an office as contemplated by law; but being in this case a foreign citizen, in view of the opinion of the Attorney General (23 Op. Atty. Gen. 608), even should he be holding an office, he need not be required to take that portion of the oath promising allegiance to the United States. It is therefore recommended that the oath taken be accepted.

(56-111.5, Sept. 10, 1912.)

PENALTY ENVELOPES: Use by post laundries.

As penalty envelopes are authorized to be used when the matter mailed relates "exclusively to the business of the Government of the United States," they may be used, in carrying on the necessary correspondence, the mailing of price lists, laundry slips, etc., required by the laundry business of post laundries established pursuant to Army Regulations.

(22-022, Aug. 15, 1912.)

OFFICERS AND EMPLOYEES: Teacher of French in the United States participation in profits.

A regiment stationed at a post where there was a post exchange, in which its constituent organizations held membership, was under orders to go to the Philippines, and the value of the shares of the respective organizations was appraised by a board as of date August 25, 1911. The board further recommended that the regimental organizations be paid their share of accrued profits to the date of their departure from the post. This recommendation was not approved by the exchange council, and the commander concurred in its action. *Held*, that the organizations of the regiment ceased to be members of the exchange after August 25, 1911, and were not responsible for the debts of the exchange nor entitled to share in its profits after that date, and that the recommendation of the board of appraisers was simply advisory and did not deprive the exchange council of its authority to determine whether or not the organizations of the regiment should participate in the profits of the exchange after said date.

(40-142, Sept. 28, 1912.)

PROMOTION: Service under prior appointment in the Medical Corps to entitle to promotion.

Section 2 of the act of April 23, 1908 (35 Stat., 67), provides that "First lieutenants shall be promoted to the grade of captain after three years' service in the Medical Corps."

An officer served in the Medical Corps for over two years, and then resigned from the service. He was afterwards reappointed and commissioned a first lieutenant in the Medical Corps. *Held*, that his service rendered prior to his resignation could not be counted as a part of the three years' service in the Medical Corps to entitle him to promotion to the grade of captain.

(C. 23135-A, June 1, 1912.)

PUBLIC PROPERTY: Chartering of a U. S. Army transport to private parties.

The local military authorities of the Philippine Islands recommended that the U. S. A. T. *Seward*, which had been recommended for survey with a view to condemnation, be chartered, pending legislation authorizing its final disposition, to private parties who had offered to pay the United States \$1,000 per month for its use and to insure the vessel against loss. *Held*, that in the absence of congressional sanction there is no authority for the disposal of property of the United States by executive agency, and that the chartering of an Army transport is a hiring out and a partial disposition of the same. *Held further*, that, admitting that it might be legal to charter the vessel to private parties, complications would then arise as to the navigation laws of the Islands to which the vessel would become subject as soon as it assumed a commercial character; that the vessel would have to be registered, and that when placed in the position of a commercial vessel it would become liable in certain cases to seizure and to fulfill many obligations involving severe penalties for their violation, all of which would constitute an insuperable objection to chartering.

(94-111, Aug. 26, 1912.)

PUBLICATIONS: Expenses of public distribution; Section 8, act of August 23, 1912.

Section 8 of the Legislative, Executive, and Judicial Appropriation Act of August 23, 1912 (Public No. 299), prohibits any expenditure after October 1, 1912, from appropriations contained in said act "for services in any executive department * * * in the work of addressing, wrapping, mailing, or otherwise dispatching any publication for public distribution," and provides for such distribution by the Government Printing Office.

Held, that the work of distributing printed reports of bureaus and other publications that are needed for official use in the conduct of their business, or the work of mailing copies of such publications to members of Congress and other Government officials who may apply for them for official use, or in replying to persons requesting information, do not come within the meaning of the act and the work of such distribution should not be turned over to the Government Print-

ing Office. *Held further*, that the distribution by way of exchange for other publications of a professional or scientific character should not be regarded as a "public distribution" within the meaning of the act.

(50-020, Sept. 23 and 24, 1912.)

QUARTERMASTER CORPS: Organization of under the Army Appropriation Act of August 24, 1912; detail of officers to.

The Quartermaster Corps provided for by section 3 of the Army Appropriation Act of August 24, 1912 (Public No. 338), came into legal existence on the date of the approval of the act to the extent that no detail to the grade of captain can be made thereto until the number of officers of that grade in said corps has been reduced below the authorized consolidated strength of 102.

(6-224, Aug. 28, 1912.)

QUARTERMASTER CORPS: Organization of under the Army Appropriation Act of August 24, 1912; taking effect of act.

Section 3 of the Army Appropriation Act of August 24, 1912 (Public No. 338), provides that the offices of the Quartermaster General, the Commissary General, and the Paymaster General shall be consolidated into a single bureau known as the Quartermaster Corps, and provides further—

"That for the purpose of carrying into effect the provisions of this section the President is hereby authorized to appoint, by and with the advice and consent of the Senate, a chief of the Quartermaster Corps herein provided for, immediately upon the passage of this Act, and it shall be the duty of the said chief, under the direction of the President and the Secretary of War, to put into effect the provisions of this section not less than sixty days after the passage of this Act."

Held, that such provisions of said section 3 as became operative without executive action went into effect immediately upon the passage of the act and therefore that the new designation given to officers by the act should be used in referring to the officers of the consolidated corps, and that the details to the consolidated corps or to any of the bureaus composing it could not be made or become effective until the number of officers in the consolidated corps had been reduced to the number authorized by the law.

Held further, that the expression in the portion of the act above quoted requiring the Chief of the Quartermaster Corps to put the provisions of such section into effect "not less than sixty days after the passage" of said act, defines a period of limitation before which the provisions of the act requiring executive action can not be carried into effect and that therefore the advancement of not to exceed six captains holding commission in the Quartermaster Corps to the grade of major as authorized by the act, not taking effect by operation of the law, but requiring executive action, must be postponed to the end of sixty-day period.

(64-250, Sept. 3, 1912.)

QUARTERMASTER CORPS: Organization of; men enlisted to take the place of civilian employees.

Section 4 of the Army Appropriation Act of August 24, 1912 (Public No. 338), provides:

"That as soon as practicable after the creation of the Quartermaster Corps in the Army not to exceed four thousand civilian employees of that corps, receiving a monthly compensation of not less than thirty dollars nor more than one hundred and seventy-five dollars each, not including civil engineers, superintendents of construction, inspectors of clothing, clothing examiners, inspectors of supplies, inspectors of animals, chemists, veterinarians, freight and passenger rate clerks, civil service employees, and employees of the classified service, employees of the Army transport service and harbor boat service, and such other employees as may be required for technical work, shall be replaced permanently by not to exceed an equal number of enlisted men of said corps, and all enlisted men of the line of the Army detailed on extra duty in the Quartermaster Corps or as bakers or assistant bakers shall be replaced permanently by not to exceed two thousand enlisted men of said corps; and for the purposes of this Act the enlistment in the military service of not to exceed six thousand men, who shall be attached permanently to the Quartermaster Corps and who shall not be counted as a part of the enlisted force provided by law, is hereby authorized: *Provided*, That the enlisted force of the Quartermaster Corps shall consist of not to exceed fifteen master electricians, six hundred sergeants (first class), one thousand and five sergeants, six hundred and fifty corporals, two thousand five hundred privates (first class), one thousand one hundred and ninety privates, and forty-five cooks, all of whom shall receive the same pay and allowances as enlisted men of corresponding grades in the Signal Corps of the Army, and shall be assigned to such duties pertaining to the Quartermaster Corps as the Secretary of War may prescribe: *Provided further*, That the Secretary of War may fix the limits of age within which civilian employees who are actually employed by the Government when this Act takes effect and who are to be replaced by enlisted men under the terms of this Act may enlist in the Quartermaster Corps: *Provided further*, That nothing in this section shall be held or construed so as to prevent the employment of the class of civilian employees excepted from the provisions of this Act or the continued employment of civilians included in the Act until such latter employees have been replaced by enlisted men of the Quartermaster Corps."

Held, that the portion of said section describing the classes of employees not included within the provisions of that portion of the act requiring the substitution of civilian employees in the Quartermaster Corps by enlisted men, refers to the persons and not to the positions held by them, and that as said positions are vacated they may be filled by the enlisted men authorized by said act; *held further*, that under the authority of the proviso to the effect that nothing in said section shall be held or construed so as to prevent the employment of the classes of civilian employees excepted from the provisions of the act, the Secretary of War may properly direct that, as to the employees required for technical work of the classes specified, vacancies occurring may be filled in the future as in the past through the Civil

Service, and in this way full operation can be given to the entire section authorizing the enlistment of men for the purpose of taking the place of civilian employees.

(6-224, Sept. 14, 1912.)

RETIREMENT: Enlisted men; counting time spent in confinement on account of desertion.

The act of March 2, 1907 (34 Stat., 1217) provides that

"When an enlisted man shall have served 30 years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list."

A soldier deserted and was apprehended February 21, 1904, and restored to duty without trial March 6, 1904. *Held*, that the man was in the service from his apprehension to the date of his restoration to duty without trial, and that such time should be counted in computing the 30 years service to entitle him to retirement.

(88-800, July 26, 1912.)

RETIREMENT: Paymasters' clerks in the Army; assignment to active service.

Upon application of the Paymaster General for the assignment of a retired paymaster's clerk to active service for staff duties in the office of the Paymaster General. *Held*, that the act of April 23, 1904 (33 Stat., 264), authorizing the assignment of retired officers of the Army to active duty in certain cases, has reference solely to commissioned officers of the Army so retired, and as army paymasters' clerks are not such commissioned officers, and as there is no statute specifically authorizing their assignment to active duty after retirement an army paymaster's clerk, retired, can not be assigned to such active duty.

(88-700, Aug. 17, 1912.)

TRANSPORTATION: Use of U. S. A. T. "Buford" in rescuing American refugees in Mexico.

At the request of the Secretary of State and upon the order of the President, the Secretary of War sent the U. S. A. T. *Buford* on a voyage along the west coast of Mexico for the purpose of obtaining information as to conditions affecting American interests in that country and to furnish relief to American citizens and transport such of them to their homes as desired to leave the country. This occurred at a time of great political disturbance in Mexico and when portions of the Army were being assembled on the Mexican border in view of such disturbance. *Held*, that the expedition, although undertaken at the request of the State Department, was ordered by the President and might have been undertaken by the War Department itself and was germane to the purposes for which the Army had been used on the Mexican border, and that the expenses incurred therefor might properly be paid from War Department appropriations.

(94-110, July 17, 1912.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

COMMUTATION OF QUARTERS: Temporary absence from permanent station.

An officer was temporarily absent from his permanent station, where he still retained his quarters, on duty in connection with an investigation of the Philadelphia Depot, Quartermaster's Department, and while so engaged stopped for various periods at Philadelphia, Pa., and Washington, D. C., where he was not furnished quarters. On the question of his right to commutation of quarters at the places of temporary duty. *Held*, that while attached to a station and in receipt of quarters thereat the officer could not at the same time claim commutation of quarters at his post of temporary duty.

(Asst. Compt. L. P. Mitchell, Aug. 12, 1912.)

EMPLOYEES: Payment of, from lump-sum appropriations. Acts of August 23 and 26, 1912.

Section 7 of the General Deficiency Act of August 26, 1912 (Public No. 340), provides:

"No part of any money contained herein or hereafter appropriated in lump sum shall be available for the payment of personal services at a rate of compensation in excess of that paid for the same or similar services during the fiscal year nineteen hundred and twelve; nor shall any person employed at a specific salary be hereafter transferred and hereafter paid from a lump-sum appropriation a rate of compensation greater than such specific salary, and the heads of departments shall cause this provision to be enforced."

Section 3 of the Legislative, Executive, and Judicial Act of August 23, 1912 (Public, No. 299), contains a similar provision except that the lump-sum appropriations effected by the first portion of said provision are only those mentioned in the act. Respecting the provision that no money appropriated by said act shall be available for the payment for personal services at a rate of compensation in excess of that paid for the same or similar services during the fiscal year 1912. *Held*, that this does not mean that individual employees may not be promoted and paid increased compensation, provided that the new rate does not exceed the rate paid for the same or similar services during the year 1912. Assuming that the different places are classified to suit the varying degrees of experience and efficiency, there is nothing to prohibit the promotion of an employee from one class to another at an increased compensation. *Held further*, that an employee holding a statutory position in the Department of the Interior, or in any other department, if otherwise eligible, can not be transferred to another bureau in said department and paid from a lump-sum appropriation at an increased compensation; nor can such employee be so transferred at a salary not in excess of that received by him in the department or bureau from which transferred and promoted to a higher salary and paid from such lump-sum appropriation.

(Compt. R. J. Tracewell, Sept. 5 and 9, 1912.)

ENLISTMENT: Three months' reenlistment pay on discharge as corporal and reenlistment.

The act of May 11, 1908 (35 Stat., 110), provides that "any private soldier, musician, or trumpeter honorably discharged" shall be entitled to three months' pay on reenlistment within a certain period. Section 31 of the act of February 2, 1901 (31 Stat., 756), provides for detaching a certain number of enlisted men for recruiting service and provides that while performing such duty one member of the party shall have the rank, pay, and allowances of sergeant, and another the rank, pay, and allowances of corporal. A private soldier in the general service so detailed on a recruiting party and given the rank, pay, and allowances of corporal was honorably discharged while performing such duty and reenlisted within the statutory period to entitle him to three months' reenlistment pay. *Held*, that the act relating to the detail of enlisted men for recruiting service was not intended to increase the number of sergeants and corporals in the Army, and that the soldier was a "private soldier" within the meaning of the law at the time of his discharge, and upon his reenlistment became entitled to reenlistment pay.

(Asst. Compt. L. P. Mitchell, Aug. 29, 1912.)

FORAGE: Issue of, to military attachés for horses kept as authorized mounts but not owned by them.

A military attaché serving abroad purchased for himself forage for the use of a horse hired and kept by him as his authorized mount, but not owned by him.

Section 1272, Revised Statutes, provides:

"Forage shall be allowed to officers only for horses authorized by law, and actually kept by them in service when on duty and at the place where they are on duty."

Section 8 of the act of June 18, 1878 (20 Stat., 150), provides:

"Forage in kind may be furnished to the officers of the Army, by the Quartermaster's Department, only for horses owned and actually kept by such officers in the performance of their official military duties when on duty with troops in the field or at such military posts west of the Mississippi River as may be from time to time designated by the Secretary of War, and not otherwise, as follows: * * *"

The act of February 24, 1881 (21 Stat., 347), provides:

"That there shall be no discrimination in the issue of forage against officers serving east of the Mississippi River, provided they are required by law to be mounted, and actually keep and own their own animals."

Held, that under the provisions of the laws quoted forage can be allowed to officers of the Army only for the authorized number of horses which are actually owned and kept by them at the place where they are on duty, and that the amounts expended for forage in this case should be disallowed.

(Asst. Compt. L. P. Mitchell, July 12, 1912.)

INDIAN SCHOOLS: Retired Army officers acting as superintendents; office.

The act of March 1, 1907 (34 Stat., 1020), provides that—

"The Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, may devolve the duties of any Indian agency or part thereof upon the superintendent of the Indian school located at such agency or part thereof whenever in his judgment such superintendent can properly perform the duties of such agency. And the superintendent upon whom said duties devolve shall give bond as other Indian agents."

The duties of an Indian agent are defined by statute (sec. 2058, Rev. Stat.; *Romero v. U. S.*, 24 Ct. Cl., 331), and their salary and term of office are fixed by law (secs. 2055 and 2056, Rev. Stat.). The salary of a superintendent performing agency duties is fixed not to exceed \$300 more than he would have received as superintendent not performing such duties (act of March 1, 1907, *supra*).

Held, that the superintendent of an Indian school performing the duties of an Indian agency is holding an office to which compensation is attached within the prohibition of the act of July 31, 1894 (28 Stat., 205), and a retired officer of the Army whose compensation amounts to \$2,500 or more is prohibited from holding such position.

(Compt. R. J. Tracewell, Sept. 7, 1912.)

TELEPHONE SERVICE: Payment for in buildings owned by the Government and used as private residences.

Section 7 of the Legislative, Executive, and Judicial Appropriation Act of August 23, 1912 (Public, No. 299), provides:

"That no money appropriated by this or any other act shall be expended for telephone service installed in any private residence or private apartment, or for tolls or other charges for telephone service from private residences or private apartments, except for long-distance telephone tolls required strictly for public business. * * *

Held, that the buildings assigned as residences to the superintendent and to the medical director of the Hot Springs Reservation situated on the reservation and belonging to the Government, notwithstanding they are public property, are, when turned over for the private personal use of Government officials, none the less private residences within the meaning of said act, and that telephone service therein should not be paid for from public funds.

(Compt. R. J. Tracewell, Sept. 25, 1912.)

TRANSPORT SERVICE: Quarters or commutation thereof for an officer of the Army while temporarily performing duty thereon.

Held, that an officer of the Army regularly assigned to a station at a home port and who is ordered to make a trip on an Army transport and to perform duty thereon during the voyage, is temporarily absent from his station on duty and is entitled to quarters or commutation at his permanent station.

(Asst. Compt. L. P. Mitchell, Aug. 19, 1912.)

Otherwise if his orders are such as to practically assign him to station on the ship.

(Asst. Compt. L. P. Mitchell, July 5, 1912.)

WAR DEPARTMENT: Filling clerical positions therein; act of August 23, 1912.

The Legislative, Executive, and Judicial Appropriation Act of August 23, 1912 (Public No. 299, p. 29), provides that

"During the fiscal year 1913 no vacancy occurring in the classified service of the War Department herein provided for shall be filled except by promotion or demotion from among those within said service, until the whole number of those herein authorized in said classified service of the Department shall have been reduced not less than five per centum."

On application for a construction of this provision by the Secretary of War. *Held*, 1. That the places in the classified service provided for in said act in the Signal Office, Office of the Chief of Ordnance, Office of the Chief of Engineers, and in the Division of Militia Affairs, to be paid from appropriations for special purposes not carried in said act, are a part of the departmental establishment at Washington and come within the provision quoted above; 2. That the intent of the statute appears to be that during the fiscal year 1913 no vacancies shall be filled except in accordance with its provisions and that therefore vacancies existing at the time the act went into effect should not be filled except as therein provided; 3. That all vacancies occurring during the fiscal year 1913 in the classified service of the War Department until the five per cent reduction has been accomplished must be filled from among those within said service and can not be filled by promotion or demotion of employees from the field service and their transfer to the bureaus in Washington, as the act relates exclusively to the classified service in the departmental establishment at the seat of government.

(Compt. R. J. Tracewell, Aug. 28, 1912, reaffirmed on rehearing Sept. 7, 1912.)

OPINIONS OF THE ATTORNEY GENERAL.

(Digests prepared in the office of the Judge Advocate General.)

EIGHT-HOUR LAW: Employment of laborers and mechanics in making repairs to Government vessels.

The act of August 1, 1892 (27 Stat., 340), limits and restricts the service and employment of all laborers and mechanics who may be employed by any contractor or subcontractor "upon any of the public works of the United States" to eight hours in any one calendar day. Upon request for an opinion as to whether said law is applicable to contracts for repairs to certain vessels owned by the Government. *Held*, that the employment of laborers and mechanics in making repairs to Government vessels is employment upon a public work of the United States, and is therefore subject to the restrictions of the eight-hour law of August 1, 1892.

(29 Op. Atty. Gen., 395, May 10, 1912.)

EIGHT-HOUR LAW: Purchase of ammunition.

The Fortification Act of June 6, 1912 (Public No. 183), contains the proviso that—

"Except in time of war or when, in the judgment of the President, war is imminent, no part of this or of any other sum in this act for

ammunition shall be expended for the purchase of any ammunition from any person, firm, or corporation which has not at the time of commencement of said work established an eight-hour workday for all employees, laborers, and mechanics engaged or to be engaged in the work of manufacturing the ammunition named herein."

Upon submission of certain questions based upon said proviso. *Held*, that the requirement of the law that a contractor for ammunition shall have established an eight-hour workday for all of his employees engaged upon the work under contract is to be construed as prohibiting his working such employees more than eight hours a day. *Held further*, that the eight-hour workday restriction of this proviso does not apply to purchases of ammunition made abroad.

(29 Op. Atty. Gen., 488, July 1, 1912.)

EIGHT-HOUR LAW: Act of June 19, 1912; contract for Government supplies.

Section 1 of the act of June 19, 1912 (Public No. 199), requires that all Government contracts shall contain a provision that the contractor shall not permit any of the laborers or employees engaged under the same to work more than eight hours in any one calendar day, with a penalty prescribed to be enforced in case of violation. Section 2 of the act excepts from the provisions of section 1 certain contracts, among others, contracts for the purchase of Government supplies with the proviso that the act shall nevertheless apply to all contracts for manufacture of supplies which the Government "has been, is now, or may hereafter" engage in manufacturing. *Held*, that the words quoted are intended only to limit the Government officers so that when the Government shall be engaged generally in the manufacture of supplies or in work where the eight-hour law applies, they can not practically evade the provisions of the law by turning over such manufacture to contractors, but that under such conditions the contract for supplies must be performed under the restrictions of the law and that it is immaterial whether the material is supplied by the Government or not. Subject to this exception the act does not apply to the purchase or manufacture of supplies. *Held further*, that under the provisions of section 3 of said act which provides that the same shall not go into effect until January 1, 1913, the requirements of said act do not apply to contracts entered into before that time, although they may extend beyond said date.

(Op. Atty. Gen., Aug. 19, 1912.)

RETIREMENT: Retired officers of the Army and Marine Corps; acting as agents in the prosecution of claims against the Government.

Section 1782, Revised Statutes, provides—

"No Senator, Representative, or Delegate, after his election and during his continuance in office, and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either

by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any Department, court-martial, Bureau, officer, or any civil, military, or naval commission whatever. * * *

The portion of the section not quoted prescribes penalties against those violating the preceding portion of said section.

On application for opinion as to the status of a retired officer of the Marine Corps with relation to said section. *Held*, that an officer of the United States Army or of the Marine Corps, retired from active service, and not wholly retired, is an officer in the employment of the Government and is within the prohibition of said section of the Revised Statutes.

(29 Op. Atty. Gen. 397, May 17, 1912.)

RETIREMENT: Retired naval officer holding appointment under the Civil Service Commission; two offices.

Section 2 of the act of July 31, 1894 (28 Stat., 205), provides that no person who holds an office under the United States, the salary or annual compensation attached to which amounts to \$2,500 or more, shall be appointed to or hold any other office to which compensation is attached, with certain exceptions, without special legislative authority. *Held*, that a commander of the United States Navy, retired, holds an office with a salary or compensation attached within the meaning of the above enactment, and as he is in receipt of a salary as such retired officer amounting to \$2,500 per annum, he can not be appointed a clerk of Class III under the Civil Service Commission, that position being also an office within the meaning of said statute with compensation attached (*United States v. Hartwell*, 6 Wall., 385).

(Op. Atty. Gen., Aug. 12, 1912.)

BULLETIN 22.

**BULLETIN }
No. 22. }**

**WAR DEPARTMENT,
WASHINGTON, November 21, 1912.**

The following opinions of the Judge Advocate General, having special reference to the Army appropriation act of August 24, 1912 (37 Stat., 569-594), are published for the information of the service in general.

[1974650, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

**LEONARD WOOD,
Major General, Chief of Staff.**

OFFICIAL:

**GEO. ANDREWS,
The Adjutant General.**

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

[First Indorsement.]

**WAR DEPARTMENT,
JUDGE ADVOCATE GENERAL'S OFFICE,
September 16, 1912.**

To the CHIEF OF STAFF.

I have had under consideration your memorandum of the 9th instant, requesting the opinion of this office on certain questions arising in the administration of the following provisions of the act of Congress of August 24, 1912. and of the joint resolution of Congress of the same date respecting the detached service of officers of the Army:

"Provided, That hereafter in time of peace whenever any officer holding a permanent commission in the line of the Army with rank below that of major shall not have been actually present for duty for at least two of the last preceding six years with a troop, battery, or company of that branch of the Army in which he shall hold said commission, such officer shall not be detached nor permitted to remain detached from such troop, battery, or company for duty of any kind; and all pay and allowances shall be forfeited by any superior for any period during which, by his order or his permission or by reason of his failure or neglect to issue or cause to be issued the proper order or instructions at the proper time, any officer shall be detached or permitted to remain detached in violation of any of the terms of this proviso; but nothing in this proviso shall be held to apply in the case of any officer for such period as shall be actually necessary for him, after having been relieved from detached

service, to join the troop, battery, or company to which he shall belong in that branch in which he shall hold a permanent commission, nor shall anything in this proviso be held to apply to the detachment or detail of officers for duty in the Judge Advocate General's Department or in the Ordnance Department or in connection with the construction of the Panama Canal until after such canal shall have been formally opened, or in the Philippine Constabulary until the first day of January, nineteen hundred and fourteen, or to any officer detailed, or who may be hereafter detailed, for aviation duty. And hereafter no officer holding a permanent commission in the Army with rank below that of major shall be detailed as assistant to the Chief of the Bureau of Insular Affairs with rank of colonel, or as commanding officer of the Porto Rico Regiment of Infantry, or as chief or assistant chief (director or assistant director) of the Philippine Constabulary, and no other officers of the Army shall hereafter be detailed for duty with the said constabulary except as specifically provided by law." (Act of Aug. 24, 1912.)

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That in the 'act making appropriation for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes,' there be substituted for the word 'hereafter' where it first occurs in the first proviso under the heading, 'Pay of officers of the line,' the words 'on and after December fifteenth, nineteen hundred and twelve.'" (Joint resolution of Congress, August 24, 1912.)

I understand your inquiries to be as follows:

1. Does the date fixed in the joint resolution, viz, December 15, 1912, mark the date on which the penalty clause of the proviso will commence to apply, so that all changes in stations of officers must be accomplished on or before that date, or is a reasonable time given after that date to accomplish such change?

2. Is the language of the proviso, "actually present for duty for at least two of the last preceding six years with the troop, battery, or company of that branch of the Army in which he shall hold said commission," to be interpreted literally as meaning that an officer must be actually present *on* duty with a troop, battery, or company, or can it be fairly interpreted as meaning that he must be present and available *for* duty with a troop, battery, or company?

More specifically, and included within the scope of this inquiry, you ask:

3. Is an officer to be considered as actually present for duty with a troop, battery, or company, or detached therefrom, within the sense of the proviso, when ordered to the following descriptions of duty: To another post to take examination for promotion; to the Philippine Islands, even if he is due to be transferred on account of foreign service; on court-martial duty at another post as member, witness, judge advocate, or counsel; to make the annual militia inspections; for militia duty at camps of instruction; for duty as umpire or observer at maneuvers; as range officer or competitor at competitions; for reconnoissance or map work; to supervise elections; as member of any board or commission at a post other than his own; to conduct prisoners; for duty as regimental or battalion

staff officer; for duty as post adjutant, quartermaster, commissary, range officer, prison officer, post-exchange officer, engineer, ordnance, signal, or police officer; as witness before a civil court; for duty with a machine-gun platoon or regimental detachment; on duty relieving flood and earthquake sufferers; sick in quarters or in hospital at his post or elsewhere; or in quarantine at a station where his company is on duty; or as Artillery district staff officer serving at a post where Coast Artillery companies are stationed, but performing no company duty; or detached from his organization in command of portion of a troop, battery, or company?

4. What application does the proviso have to an officer in the status of arrest, or undergoing trial, or changing station from one company assignment to another, or awaiting orders?

The legislation here presented for construction is the latest of a long series of attempts to regulate the evil of excessive detached service of officers and the first attempt at statutory regulation of detached service within the military establishment. Its proper construction can, it is thought, be reached best by considering previous attempts at departmental regulation and the long line of official recommendations on the subject, in the light of which it has to be presumed Congress has legislated.

The provisions of paragraphs 4, 5, 6, and 7 of the Army Regulations of 1835 appear to be the first attempt at departmental regulation of this evil. In effect they prohibited the detachment of officers for duty in any staff department *or on any detached service* for a longer period than two years, but provided that they might be relieved earlier, according to circumstances, except at the Military Academy or in the Ordnance Department, where they might continue detached for a period not to exceed four years. It was provided that this rule should not apply to aides-de-camp, nor to the commandant of the Corps of Cadets and officers of engineers detailed for duty at the Military Academy.

The 1857 regulations dealt with detachments from company, regiment, or corps for duty in the staff departments *or other situation*, and provided that no officer (aides-de-camp excepted) should remain so detached longer than four years, but carried the further restriction that an officer of the mounted corps should not be separated from his regiment except for duty connected with his particular arm. No change was made in the succeeding three editions of the Army Regulations (1861, 1863, and 1881), nor until 1885, when the regulation respecting detached service was amended by G. O. No. 85 of that year, so as to incorporate the provision "*nor shall any officer so remain detached longer than four years, unless assigned to special duty by the War Department.*"

Army Regulations of 1889 preserved this latter provision, but the regulation respecting detached service was subsequently amended by G. O. No. 52, A. G. O., 1890, so as to require that when an officer not assigned to special duty by the War Department shall have been away for four years *his detail shall cease and he will apply in due season in advance for orders to rejoin his proper command.* This requirement was preserved in Army Regulations of 1895 and 1901. In the Army Regulations of 1904 the regulation took on a new form, with some of the verbiage of the law we are now considering, reading in relevant portion as follows:

"40. * * * When at any time an officer has served less than two of the preceding six years with his corps or arm of the service he will be ordered to join said corps or arm of the service, unless on detached service which, under the law, can not be so terminated. Exceptions to this rule will not be made except in case of emergencies or in time of war."

The above-quoted paragraph is repeated in identical words in paragraph 40 of the Army Regulations of 1908 and 1910. Since January 23, 1907, the regulation has been supplemented by Circular No. 3 of the War Department, issued on that date, providing as follows:

"Hereafter an officer who has been detached from his proper corps or arm of the service for a period approximating four years, included in the preceding period of six years, will be deemed ineligible for further detail or detached duty which would normally prolong his absence from his proper corps or arm beyond the period contemplated by paragraph 40 of the regulations, and no captain of the line of the Army will be detached from duty with his proper arm, except for such duty as legally pertains to the grade of captain, without the specific approval of the Secretary of War."

Finally, we have the regulation on this subject restated in "Changes of Army Regulations, No. 8," dated July 10, 1912, amending paragraph 40, to read as follows:

"40. In time of peace no officer below the grade of lieutenant colonel shall be detached nor permitted to remain detached from that branch of the Army in which he holds a commission or from the organization, if any, to which he shall have been assigned in said branch by competent authority for more than four years in any period of six years. Temporary duty in connection with rifle or pistol competitions, with courts-martial or military boards, or as umpire at maneuvers, not aggregating more than two months in any one year, performed while not regularly on detached service, leaves of absence on full pay taken while not regularly on detached service, and duty as a student officer at a service school, shall not be deemed detached service within the meaning of this paragraph, but upon completion of a tour of duty as student at a service school officers will be returned to their respective regiments, organizations, corps, or departments, and will not be detached therefrom for two years thereafter unless such detachment be authorized or directed by the Secretary of War. This paragraph shall not be construed so as to impose restrictions beyond those imposed by statute upon the detail or redetail of officers to the staff corps or departments or the General Staff Corps."

This latest regulation was promulgated while the legislation we are here considering was pending enactment and represented the furthest limit the department deemed it practicable to go in limiting detached service of officers.

At no time has the department attained even a fair measure of success under any of the regulations quoted above either in maintaining troops, batteries, and companies with an adequate commissioned personnel, or in distributing throughout the entire body of officers and in equal proportions the privilege of detached service. This fact is fully established by the records of the department and by the admission of superior commanders in official reports. The

reason is not far to seek. Many statutes have been passed during the period here in reference authorizing details of officers to duties more or less remotely connected with their military duties, and, incidentally, it may be remarked, more appropriate for performance by officers of company than of field grades. The department has thus had to deal with an ever-increasing demand for the detail of officers away from their duties proper and with many requests emanating from sources outside the service for the detail of particular officers. The importance of detached duty to be performed generally required that these places should be filled with a superior class of officers. As remarked by the Chief of Staff, in a memorandum submitted to the Secretary of War November 26, 1907, "Nearly all detached service calls for the most experienced officers and even those adjudged the most capable." Due to considerations of this character, selection for these duties, as well as for numerous military duties for which it is necessary to detach officers, came to be regarded as a reward for the most deserving officers.

It is not strange that under conditions like these there was a failure to achieve the desired results under any of the regulations adopted, nor that the Chief of Staff in a letter to the President, dated April 11, 1908, should have remarked, with reference to the execution given to paragraph 40, Army Regulations of 1908, and Circular No. 3 of the War Department, of January 27, 1907, cited, *supra*, "It (detached service) is a most difficult question to deal with, and I hardly believe there is any way of preventing a violation of the above regulation and circular."

The evil of absenteeism increased from year to year despite the earnest effort of the department, extending over quite a prolonged period, to regulate and control it. The extent of the evil was brought forcefully to the attention of Congress in the hearing before the Committee on Military Affairs of the House of Representatives held January 28, 1909, the committee having under consideration S. 2671, providing for extra officers. In the printed report of that hearing there are included the reports of all the regimental commanders of Cavalry, Field Artillery, and Infantry, and of the Chief of Coast Artillery, respecting the evil of absenteeism of officers as conditions stood on July 31, 1908. The most prominent complaint elicited was that too many officers were absent from troops, batteries, and companies, and it was strongly emphasized that serious detriment to the discipline of the men and the efficiency of the service resulted therefrom, as the following extracts from said reports show:

Col. E. J. McClernand, First Cavalry, says:

"1. The duties of the captains who are absent (six in this case) fall to younger and less experienced men than the law contemplates, to the detriment of discipline and instruction. Such absence is also a frequent source of discontent on the part of the enlisted men.

"2. The decreased strength of the commissioned personnel present for duty has resulted in the frequent change of troop commanders to meet unforeseen details and necessities. This interferes with troop administration and is unfair to the officer and enlisted man." (P. 41.)

Col. J. H. Dorst, Third Cavalry, says:

"It will be noticed that all troops but one were commanded by lieutenants—5 of them second lieutenants—and that of the 22 officers present 16 were lieutenants. The officers are habitually insufficient in number to do all their required work well. Necessarily many things are slurred. Many delays, omissions, and errors are overlooked or condoned because it is known that the officers have not the time to give the matters in question their personal attention without neglecting something else, and can not justly be held responsible for what seem to be neglects. A low standard inevitably becomes established by and by, and is accepted as the correct standard by the younger officers." (P. 43.)

Col. F. K. Ward, Seventh Cavalry, says:

"It is impossible, with so many officers absent, to put the regiment in the condition it should be as regards efficiency. The discipline and instruction, in fact everything that contributes to efficiency, is unavoidably affected injuriously. Many troops have but one officer present, and one is not enough for thorough instruction. Frequent changes of troop commanders are unavoidable. Much of the instruction has to be by officers temporarily attached, because the one officer present is on other duty. The statement can not be made too emphatic that discipline, instruction, contentment of the enlisted men, in fact everything which contributes to efficiency, is now injuriously affected by the absentee list." (P. 47.)

Col. George A. Dodd, Twelfth Cavalry, says:

"Some of the effects of absenteeism and frequent changes of organization commanders are:

"First. A spirit of discontent on the part of enlisted men and a dislike on their part of being commanded by officers entirely inexperienced in the practical performance of military duties. Each captain, or troop commander, if he is with his troop long enough, should have a system of his own so far as the internal management of his troop is concerned—an official individuality or equation which is imparted not only to the soldiers but to officers under him. It is that which holds an organization together, imparting to it an individual pride which is essential to good results. The numerous and frequent changes of troop commanding officers, as indicated below, destroys all this, thereby weakening discipline. Old soldiers have been known to openly declare on being discharged that they would reenlist were it possible to know who they were to serve under." (P. 52.)

Brig. Gen. Arthur Murray, Chief of Coast Artillery, says:

"A mortar or gun battery or a mine field absolutely requires a certain number of officers for its proper service. These officers can not be dispensed with without a drop in efficiency. Their duties can not be doubled up and performed by a less number of individuals, no matter how proficient the latter may be. Their several stations are separated, and the duties pertaining to each position are all that one man can attend to at the time.

* * * * *

"Every effort has been made to decrease the number of officers of Coast Artillery detached from companies. Staff positions have been doubled up, leaves of absence have been cut down or refused,

but in spite of these efforts the excessive shortage remains to-day an active source of harm, sapping the efficiency of the corps and the proper service of the coast defenses of the country." (P. 62.)

Col. William H. C. Bowen, Twelfth Infantry, says:

"Could officers (particularly captains) be assigned to duty with companies with any probability of remaining sufficiently long to become thoroughly identified with the organization, much better results would be obtained, and discipline, esprit de corps, and zeal would not be absolutely impossible as it is at present.

"There is no doubt in my mind but that a large, very large, percentage of desertions in the Army is caused by the constant changing of company officers, especially company commanders." (P. 75.)

Col. R. H. R. Loughborough, Thirteenth Infantry, says:

"This is no unusual condition. When the regiment left the Philippine Islands in September, 1907, there were only 20 officers on duty with it.

"The absence of so many officers is extremely demoralizing and necessitates the constant change of officers from one company to another. The change of a company commander is bad enough, but when officers from one company are constantly being placed in command of companies with which they have never served, the effect on both the officer and the enlisted men is to cause a lack of interest, each expecting a further change and none feeling that the conditions are permanent. If a lieutenant on duty with a company were to succeed to its command upon the departure of the captain, the effect would be bad, but incomparable with the demoralizing effect of placing in command a lieutenant from another company or even battalion who knows nothing of the company or the policy of its captain." (P. 76.)

Col. C. A. Williams, Twenty-first Infantry, says:

"Every detail for courts, boards, detached service for brief periods, officers of the day and guard, absence on leave, sick, etc., materially interferes with that even conduct of affairs which is contemplated by law providing three officers for each company, which law its makers believed necessary to the administration of affairs of the organizations for which they were provided.

"The recent experience in the Twenty-first Infantry amply illustrates and demonstrates the soundness of the views here advanced. Nine companies participated in the march from Fort Logan, Colo., to the maneuver camp at Crow Creek Reservation. During this march of over 200 miles, the most important work of the year, not a captain was with these companies, and but one lieutenant with each." (P. 84.)

To continue these quotations would serve only to show unanimity of opinion upon the part of regimental commanders. Collectively their reports show that absenteeism from troops, batteries, and companies was primarily in view as the most radical evil to be remedied, although many of them refer to embarrassments incident to absence of officers of field grade. To the same effect are the reports of department commanders, through whom the reports of regimental commanders were forwarded, as illustrated by the following comments:

Gen. Brush remarks:

"Unless more officers are soon furnished, so that companies, troops, and batteries shall at least have captains, the Army must deteriorate. The lack of permanent, experienced organization commanders is re-

sponsible for most of the desertions in the Army to-day. One organization in this department has had five commanders within the year, and this is practically a sample of what is going on throughout the service." (P. 38.)

Gen. Barry expressed himself in the following language:

"The aim of a captain should be to remain with his company, and the aim of the authorities should be to keep him there, and detach him only under exceptional circumstances or when the law so provides. Many of the duties for which captains are detached might well be performed by experienced first lieutenants. The unit upon which all military organizations depends is the company, and with good companies good battalions, regiments, etc., necessarily follow." (P. 38.)

In his annual report for the year 1906 the Secretary of War used the following language:

"Over 82 per cent of the officers on detached service on June 30, 1906, were captains or lieutenants of the line. The duties upon which detached officers are engaged are all necessary and useful and in the main are of a military character and calculated to exert a broadening influence upon the officers thus engaged. It goes without saying, however, that the details of company officers ought not to be so many as to interfere with the discipline and efficiency of their commands. Some commanding generals are of the opinion that this point has been reached and that this condition of affairs contributes to a restlessness and dissatisfaction on the part of enlisted men, which is not without its effect in the matter of desertions." (P. 28.)

The Chief of Staff, in a memorandum report to the Assistant Secretary of War, dated December 2, 1909, suggests the following partial remedy:

"It is believed that the policy should be to furnish a sufficient quota of officers for service with companies before filling regimental and battalion staff positions, and if a company at any post has less than two officers provided for duty with it and a regimental or battalion staff officer is available, he should be detailed with the said company pending the return of the proper quota of company officers."

In a prior report of April 11, 1908, rendered direct to the President, the Chief of Staff, commenting on the difficulties encountered in the enforcement of regulations respecting detached service of officers, expressed the opinion that there was no certain way of preventing a violation of such regulations, and suggested somewhat tentatively the enactment of some kind of a law which would deprive an officer of pay whenever detached in violation thereof in these terms:

"A law would be automatic and self-enforcing * * *. Without a practical test of such a law I believe it would be impossible to determine whether it would promote the best interests of the service or not. The provisions of the law should be given most careful study in detail or injury to the service is most liable to result. It will certainly result in embarrassment and inconvenience at times, no matter how drawn. If the President thinks such a law would be advisable, this study can be given with a view to introducing it in the next Congress."

Under date of April 13, 1908, the President returned this report to the Chief of Staff with the remark: "I agree with you that at

present the proposed law would not be desirable, as in a number of cases its operation might be contrary to the best interests of the service." This was followed by directions as to administrative measures which might be adopted to make more certain the strict enforcement of existing regulations limiting detached service.

Finally, we have to note the Senate resolution of January 22, 1912, calling for the names, rank, and organization of all officers of the line of the Army who during the six years ending July 31, 1911, had not served two years in the organizations in which they were respectively commissioned, or who during the 12 years ending on the same day had not served 4 years in said organization, with the nature and duration of detached service. The reply of the department thereto, dated January 30, 1912, clearly reveals that under the rules of selection that had prevailed during the period covered by the report excessive absenteeism of particular officers had resulted, many having exceeded the limits of detached service specified in said resolution.

It thus clearly appears from the above reports and from others of this period I have examined that at the time the legislation we are here considering was pending before Congress strong service opinion had manifested itself in an unmistakable and emphatic way to the effect that the evil of absenteeism of troop, battery, and company officers had greatly impaired the efficiency of the Army; that excessive detached service of particular officers under the rules of selection which were followed had resulted; that this evil was to some extent promoted by the practice of filling regimental and battalion staff positions at the expense of an adequate commissioned personnel for troops, batteries, and companies, and that the opinion of the Chief of Staff was against this practice; that the standard fixed by service opinion for possible attainment was at least two officers actually present for duty with each troop, battery, and company; and that under administrative measures adopted there had been failure to remedy these evils and generally to achieve the desired results. It is also apparent that all these facts were of common knowledge; that most of them had been brought directly to the attention of the military committees of Congress in recent years, and were well within the knowledge of Congress at the time the legislation here under review was enacted.

It will be of assistance in construing the legislation here in reference to trace briefly the history of its enactment.

The Army appropriation bill as reported to the House by the Committee on Military Affairs contained no provision on the subject. While the bill was on its passage in the House the following amendment was offered:

"Provided, That hereafter no pay or allowance shall be paid or allowed to any officer for any period during which he shall have been detached for duty of any kind for more than four of the preceding six years from the organization in which he is commissioned, unless such continuous detachment from such organization for more than four years shall have been specifically authorized by law." (Cong. Rec., Feb. 9, 1912, p. 1990.)

The amendment was passed by the House in the following form:

"That no money appropriated by this act shall be paid to any officer for any period during which he shall have been detached for any duty of any kind for more than four of the preceding six years

from the organization in which he is commissioned, unless such continuous detachment from such organization for more than four years shall have been specifically authorized by law." (See Cong. Rec., Feb. 9, 1912, pp. 1991-1993.)

The bill then went to the Senate and was referred to the Committee on Military Affairs, which, in lieu of the detached-service provision as enacted by the House, reported the following:

"Provided, That hereafter in time of peace no officer of the line shall be detached or permitted to remain detached from his regiment or corps who has not served for at least three years of the preceding period of six years prior to such detachment with the regiment or regiments of Cavalry, Field Artillery, or Infantry or with the organizations of the Coast Artillery Corps to which he shall have been assigned by the War Department; but this shall not apply to officers detailed in the Ordnance Department and the Bureau of Insular Affairs, as authorized by the act of Congress approved June twenty-fifth, nineteen hundred and six, and March second, nineteen hundred and seven."

The Senate, after substituting two years for three years and for the reference to the act of March 2, 1907, a reference to the act of March 23, 1910, accepted the substitute of the Senate Committee on Military Affairs, and also adopted the following provision:

"Provided, That no money appropriated by this act shall be paid to any officer for any period during which any other officer by his order shall have been detached for any duty of any kind for more than four of the preceding six years from the organization in which he is commissioned, unless such continuous detachment from such organization for more than four years shall have been specifically authorized by law."

Upon the disagreeing vote of the House the bill went to conference, and the conferees reported the detached service provision in the following form:

*"Provided, That hereafter, in time of peace, whenever any officer holding a permanent commission with rank below that of lieutenant colonel shall not have been actually present for at least two of the preceding six years in that branch of the Army in which he shall hold said commission, and with the organization, if any, to which he shall have been assigned by competent authority, such officer shall not be detached nor permitted to remain detached from said branch or from said organization; and all pay and allowances shall be forfeited by any superior officer for any period during which, by his order, or with his permission, or by reason of his failure or neglect to issue or cause to be issued the proper order or instructions at the proper time, any other officer shall be detached or permitted to remain detached in violation of any of the terms of this proviso: *Provided further, That nothing in the foregoing proviso shall be held to apply in the case of any officer for such period as shall be actually necessary for him, after having been relieved from detached service, to join that branch in which he shall hold a permanent commission and the organization, if any, to which he shall be assigned by competent authority, nor shall it be held to apply in the case of any officer absent temporarily on courts-martial or military boards, or upon leaves of absence authorized by existing law: And provided further, That hereafter details to the**

Ordnance Department may continue to be made as authorized by existing law, and, in the discretion of the President, those details, or any of them, now existing to the Philippine Constabulary need not be terminated until the first day of January, nineteen hundred and thirteen." (Conference report, May 27, 1912.)

The conference report was accepted by both Houses, but the bill was vetoed by the President.

The new Army appropriation bill (H. R. 25531), reported to the House by the Committee on Military Affairs on July 1, 1912, contained the same provision as the original bill passed by the House.

As passed by the Senate on August 14, 1912, the bill carried the following provision:

"Provided, That hereafter in time of peace no officer of the line shall be detached nor permitted to remain detached from his regiment or corps who has not served for at least two years of the preceding period of six years prior to such detachment with the regiment or regiments of Cavalry, Field Artillery, or Infantry, or with the organizations of the Coast Artillery Corps to which he shall have been assigned by the War Department; but this shall not apply to officers detailed in the Ordnance Department, the Bureau of Insular Affairs, as authorized by the acts of Congress approved June twenty-fifth, nineteen hundred and six, and March twenty-third, nineteen hundred and ten, or to any officer on duty in connection with the construction of the Panama Canal until the same shall have been formally opened; and in the discretion of the President, up to the first of January, nineteen hundred and fourteen, it shall not apply to any officer on duty with the Philippine Constabulary, and hereafter no officer below the rank of major shall be detailed as chief or assistant chief of the Philippine Constabulary, and no officer shall hereafter be assigned to duty therewith except as specifically provided for by law: Provided, That duty as a student officer at a service school within the continental limits of the United States shall not be construed as detached service within the meaning of the preceding proviso."

The bill then went to conference, and was reported back with the proviso substantially amended, the concluding provision excepting student officers at service schools being omitted. It was finally passed by both Houses in the form in which it appears on page 2 of this opinion.

A careful reading of this legislation in its various developments as shown above discloses that as to the number of officers affected by its provisions the legislation as enacted imposes a less rigorous rule than was sought to be imposed in any of the earlier forms of the bill. The original proviso applied to all officers, irrespective of grade or branch, but its application was subsequently limited to officers below the grade of lieutenant colonel, and finally to officers of the line with rank below the grade of major. But in respect of detached services of officers remaining within its provisions the increasingly restrictive character of the legislation is strikingly evident. In the form in which the provision originally passed the House it covered detachments from the *arm* in which an officer is commissioned, and therefore service with the arm, though not involving service with a regiment, troop, battery, or company or service with troops—such as membership on the Cavalry or Infantry equipment boards—would

have satisfied its requirements. Under the terms of the Senate committee's substitute for the House provision, the requirements narrowed to service with a *regiment* of Cavalry, Field Artillery, or Infantry, or with an organization—that is, companies—of the Coast Artillery, and service with an *arm* alone would no longer have met the requirements. In the form reported by the conference and finally accepted by both Houses of Congress, but vetoed by the President, the requirement was for service with the *branch* of the Army in which commissioned and with the *organization*, if any, to which the officer may have been assigned by competent authority. As finally enacted the restriction was made much more severe. The officer must, under the law as enacted, be *actually present for duty* with a troop, battery, or company, for the prescribed period, and if he stands *detached* therefrom *for duty of any kind* for a period in excess of that authorized the penalty of the law is incurred. The manner in which the language is varied in other specific details in the development of this legislation, especially with reference to shifting the burden of loss of pay and allowances for violation of the terms of the proviso from the officer ordered to the officer ordering or responsible for the issue of the proper orders, and to making the penalty which, in the first instance, was operative only on money appropriated by the Army appropriation bill applicable to money appropriated for pay and allowances by any act, indicates the firm purpose of Congress to insure the execution of the specific terms of the law. The insertion of the word “actually” before the words “present for duty” is especially significant in this regard. The intent that the legislation here under consideration should be drastic in character and sure in its execution could hardly have been more emphatically expressed.

Premising this much as to the purpose and character of the legislation here under consideration, I will proceed to answer the several questions submitted which it will be convenient again to quote:

“1. Does the date fixed in the joint resolution, viz, December 15, 1912, mark the date on which the penalty of the proviso will commence to apply, so that all changes in stations of officers must be accomplished on or before that date, or is a reasonable time given after that date to accomplish such change?”

The reasoning of the Supreme Court of Indiana, in the case of *Pennsylvania Company v. State*, decided November 1, 1895, appears to be decisive of this question. The court in that case had under consideration an act requiring railroad companies under heavy penalties to place in each passenger depot where there was a telegraph office a blackboard and to note thereon at least 20 minutes before the time for the arrival of each passenger train, the fact as to whether such train was on time, and if late, how much. The act was approved March 9, 1889, and, under a provision of the constitution of the State, went into effect 60 days thereafter, or on May 10, 1889. The company contended, in effect, that it was entitled to a reasonable time after the latter date in which to prepare and place blackboards upon which to note the time of arrival of trains. The court, first noting the language of the act as to the time when compliance should begin, viz, “immediately after the taking effect of this act,” answered the contention in the following language:

"If there had been an emergency clause under which penalties would by the letter of the law have attached at once upon its passage, manifestly it would have worked great hardship to hold that the legislature meant to inflict heavy penalties for failing to do that which necessarily required time for preparation to do. Probably the situation thus stated would have required the holding that the word 'immediately' was not employed to exclude the intervention of a reasonable time within which to prepare and place the boards required. So we may say with reference to the time when the law went into force (May 10, 1889), if that were the first notice that railway companies were required to take of the law. As we find it, the law was approved March 9, 1889, and was proclaimed in force May 10, 1889—more than 60 days, and, upon the allegations of the answer, an abundant time within which to prepare for compliance with the law and for the avoidance of the prescribed penalties. The law having passed without an emergency clause, was not in force until May 10, 1889. However, that its passage by the legislature and the declaration of the constitution that it should be in force from its distribution and the proclamation of the governor were notice to railway companies sufficient to enable them to prepare for its requirements we have no doubt."

Had the joint resolution not been passed the proviso here under consideration would have been in force and effect in its entirety from the date of its approval, i. e., from August 24, 1912. In this event the holding would have been a necessary one that the fact that the act went into immediate effect upon approval did not operate (using the language of the case above cited) to "exclude the intervention of a reasonable time within which to prepare" for a compliance with the law and for the avoidance of the prescribed penalties. The effect of the joint resolution, however, was to postpone the execution of this provision for a period of nearly four months, and, I think, following the doctrine of the above case, this postponement must be held to be a grant of what the Congress regarded as the time necessary to enable the department to prepare for compliance with the law.

I therefore answer your first question that the period between the approval of the proviso (Aug. 24, 1912), and the date of its taking effect (Dec. 15, 1912), is one of preparation for meeting the requirements of the statute; that the changes in the status and stations of officers necessary to meet the requirements of the proviso must be ordered so as to become effective on or before December 15, 1912; and that on and after that date the penalty clause of the proviso will be operative against any officer responsible for its nonenforcement.

2. *Is the language of the proviso, "actually present for duty for at least two of the last preceding six years with the troop, battery, or company of that branch of the Army in which he shall hold said commission," to be interpreted literally as meaning that an officer must be actually present on duty with a troop, battery, or company; or can it be fairly interpreted as meaning that he must be present and available for duty with a troop, battery, or company?*

This second inquiry relates to the initial part of the proviso, which it will be convenient again to quote:

"Provided, That hereafter in time of peace whenever any officer holding a permanent commission in the line of the Army with rank

below that of major shall not have been *actually present for duty* for at least two of the last preceding six years *with a troop, battery, or company* of that branch of the Army in which he shall hold said commission, such officer *shall not be detached nor permitted to remain detached from such troop, battery, or company for duty of any kind*; and all pay and allowances shall be forfeited by any superior for any period during which, by his order or his permission, or by reason of his failure or neglect to issue or cause to be issued the proper order or instructions at the proper time, any officer shall be detached or permitted to remain detached in violation of any of the terms of this proviso; * * *."

The proper construction of the above-quoted provision turns on the meaning to be assigned to the italicized words "troop," "battery," and "company," and the italicized phrases "actually present for duty" and "shall not be detached nor permitted to remain detached * * * for duty of any kind." The interpretation to be given the words "troop," "battery," and "company" will be first considered.

The act of February 2, 1901 (31 Stat., 743), fixes the strength of each arm or branch of the service and then provides:

"SEC. 2. That each regiment of Cavalry shall consist of * * * one band and twelve troops * * * ; each Cavalry band shall be organized as now provided by law. Each troop of Cavalry shall consist of one captain, one first lieutenant, one second lieutenant, one first sergeant, one quartermaster sergeant, six sergeants, six corporals, two cooks, two farriers and blacksmiths, one saddler, one wagoner, two trumpeters, and forty-three privates * * *."

Substantially similar provisions appear in section 10 of the same act, which prescribes the organization of an Infantry regiment and company; and in sections 7 and 8 of the act of January 25, 1907 (34 Stat., 862), which prescribes the organization of the Field Artillery regiment and battery; and in sections 5 and 6 of the latter act, which prescribes the organization of the Coast Artillery and provides that—

"Each company of Coast Artillery shall consist of one captain, one first lieutenant, one second lieutenant, one first sergeant, one quartermaster sergeant, two cooks, two mechanics, two musicians, and such number of sergeants, corporals, and privates as may be fixed by the President * * *."

It thus appears from the legislation quoted that Congress has specifically designated the composition of regiments, distinguishing between troops, batteries, and companies, on the one hand, and bands on the other; and has likewise designated the composition of troops, batteries, and companies, by prescribing the number and grades of officers and enlisted men for each. In so doing it has, I think, pronounced a fairly specific definition of what a troop, battery, or company is, and has plainly limited the number of them that normally compose the several branches of the service. The presumption is strong that Congress has employed these terms in the proviso here under consideration in the sense they are defined in the legislation above quoted, and this presumption should prevail, unless a wider definition is suggested by the context.

In your third inquiry the question is raised whether the terms "troop," "battery," and "company" can not be construed to cover

machine-gun platoons and regimental detachments, such as rifle teams; and, of course, the same question arises as to the Army service detachments maintained at the service schools and at the Military Academy, the Cavalry, Field Artillery, and Engineer detachments maintained at the latter point, and the recruit and prison companies maintained at the recruit depots and the United States Military Prison and its branch.

The recruit and prison companies are authorized by the acts of June 12, 1906, and March 2, 1907 (34 Stat., 242, 1160), and by the act of March 3, 1909 (35 Stat., 741). Under the terms of these acts these companies are composed of enlisted men drawn from the Army at large, and are given the noncommissioned officers allowed by law for Infantry companies. While their organization resembles more closely that of the Infantry company, it is not the effect of the law to assign them to the Infantry branch of the Army. In practice these companies are officered indiscriminately from officers drawn from the four branches of the service. It will scarcely be contended by anyone that service of an officer of Cavalry, Field Artillery, or Coast Artillery with a recruit or prison company would be service with a troop, battery, or company of *that branch of the Army in which he is commissioned*, and I think this must be held to be true also in the case of an Infantry officer serving with one of these companies; not only is he not serving with an organization of the branch of the Army in which he is commissioned, but the range of his duties while so serving stands limited by the purpose for which these companies are created and maintained, viz, recruit instruction and the guarding of prisoners with the incidental company administration. This does not constitute in any sense the equivalent of the training and experience which are incident to actual service in a corresponding unit of his branch, and which it is the primary purpose of the statute to enforce. The same observations hold in respect of service of an officer with the Cavalry, Field Artillery, and Engineer detachments maintained at the Military Academy, and the Army service detachments maintained at the service schools. All these detachments are constituted by detaching men from the Army at large, and they are not made component parts of any branch of the service by provision of law. I do not understand that the attempt is made in any of them to carry on that comprehensive training which is usual in corresponding units of the several branches of the service and most necessary for efficient field service.

For the reasons here indicated I conclude that an officer's service with recruit and prison companies, or with any of the detachments above named, is not service with a troop, battery, or company of the branch of the service in which he is commissioned, and does not, therefore, meet the requirements of the statute.

We come now to the phrase "actually present for duty." "Present for duty" is the language of the troop, battery, and company morning report—language which conveys to every line officer a definite meaning. Before the words "present for duty" we find, by way of emphasis, the word "actually." I can not see my way clear to treat the insertion of this word as without purpose and meaning, and must conclude that by the use of the emphatic word "actually" in connection with the definite phrase "present for duty" Congress intended

to make clear that the expression should be construed in a literal and restricted sense.

In the construction of the proviso we are aided at this point by keeping in mind the obvious purpose of the law which, in effect, is to define and regulate the service relation of the line officers of company grade to troops, batteries, and companies, with a view to insuring the requisite amount of service with each of these units. It will be readily conceded, I think, that performance of duty is the object of the *presence* which the statute commands, and is the single contemplation of the phrase "actually present for duty," and, further, that any presence that does not contemplate as its primary purpose and result the performance of duty as the duty shall normally occur is a constructive rather than an *actual* presence for duty and is not a compliance with the statute.

The conclusion here reached indicates very plainly the answer respecting the status of regimental staff officers; but as special argument was made in their behalf in one of the memoranda submitted to me for consideration, their status under the proviso will be more fully discussed.

Attention was invited in said memorandum to the fact that regimental staff officers remained present with the command, though they were not actually present with a troop, battery, or company; that they are on duty with troops and perform service therewith; and, further, that they are immediately available under the orders of the commander of the regiment to rejoin troops, batteries, or companies, as the exigencies of the service require; and it is argued that in being thus present with the regiment and being immediately available under the orders of the regimental commander for duty with troops, batteries, or companies it should be held that they are actually present for duty with a troop, battery, or company within the sense of the statute.

Regimental staff officers are appointed from the captains of the regiment by the regimental commander and are designated not as "company officer," but as "adjutant," "quartermaster," and "commissary" (A. R., 248); their duties as prescribed are entirely different from the normal duties of the company officer (A. R., 251 et seq.); their tours are limited to four years, and an officer is ineligible for a second tour "until he shall have served two years as a *company officer*" (A. R., 249); they are not borne on any troop, battery, or company roll, report of return "for duty," or otherwise, but are returned as a part of the headquarters, field, and staff. The appointment of a regimental staff officer, as a rule, in and of itself cancels his assignment and separates him from his company, and the Regulations contemplate that he shall not render company duty except by virtue of special assignment by the regimental commander (A. R., 255). His normal duties are not, therefore, those of a company officer, and the mere fact that he is directly and exclusively subject to the orders of his regimental commander can have no effect upon his relation or status with a company or as a company officer until the regimental commander gives the order and creates the relation or status; whereupon the staff officer becomes a company officer and stands ready to perform, and in the natural course of events does perform the usual and normal duties of a company officer. The

regimental staff officer has the potential status, which may be translated into the actual status; but in this regard the word *actual* is the antithesis of the word *potential*, or, legally speaking, of the word "constructive." The use of the word "actually" in the proviso precludes a resort to the suggested construction that the regimental staff officer can be held to be present for duty with one of the organizations named. This reasoning applies as well to post and battalion staff officers and to other officers withdrawn by regimental and post commanders by authority of law, regulation, and customs of service from performance of company duties.

But the construction suggested must be rejected, I think, for other reasons. We have already seen that in the official reports on absenteeism of officers of company grade which preceded and presumably led up to this legislation stress was laid upon the objectionable practice of filling regimental and battalion staff positions by depleting a troop, battery, or company of its officers. To adopt the construction suggested would be to deny to the statute remedial effect as to this evil. Further, under the construction suggested, an officer by alternating tours of ordinary detached service with details to regimental, battalion, and post staff positions would be able to avoid compliance with what I conceive to be the plain requirement of the statute for two years' actual presence for duty with a troop, battery, or company out of each six-year period, and thus remain continuously absent from duty with such organizations during his service in company grades. It can not reasonably be assumed that Congress intended to permit this.

From these considerations I conclude that in determining when officers who have been withdrawn from the performance of normal duty with a troop, battery, or company, including those so withdrawn by the orders of their immediate regimental or post commanders, may be treated as again "actually present for duty" with a troop, battery, or company, the true rule is that when such an officer shall resume, pursuant to competent orders, such an actual relation to a company as will make him available, without further orders, to perform the usual duties of his grade with respect to said company, with the primary purpose of performing them, and therefore stands able and ready to perform them as they arise in the course of military administration, he is "actually present for duty" with a troop, battery, or company within the meaning of the statute; and that anything short of this would be only a constructive presence, and not a compliance with the proviso. If an officer is not thus present for duty with a troop, battery, or company, then he is not actually present within the terms or intendment of the proviso, if its words are not to be forced out of their evident meaning. I may add that I find nothing in the law which prevents the assignment of additional duties to an officer of company grade, provided it leaves him in the duty status to his organization as here defined.

In the construction of the phrase "shall not be detached nor permitted to remain detached * * * for duty of any kind" the qualifying words "of any kind" must be held, I think, to bring within the purview of the phrase all descriptions of duty for which it is customary to detach officers irrespective of its character or duration.

The suggestion has been made to me that it would be competent to read into the proviso an exception as to any detached duty which, under the customs of the service or the usual practice of military administration, would not require a formal order of detachment from a troop, battery, or company, such as absence undergoing examination for promotion, on duty as member of boards, courts, or commissions, or on minor duties directed to be performed by post or regimental commanders, such as map making, etc. In construing the phrase "actually present for duty" I have not been able to regard the kind of order which creates or destroys the duty status or the grade of authority that issues such orders as a material fact. Neither do I think it is material in determining whether any kind of "detachment" comes within the terms of the proviso. The law regards substance, not form. The mere fact that a formal order is not required or is not issued or does not denominate such duty as detached duty, or does not in terms order a detachment of any kind, can not conclude the facts in the case or serve to qualify the force of the words of the proviso "duty of any kind"; nor can I see how, under the terms of the statute, the duration of the duty, whether transitory or temporary or for the longer and usually more or less definite periods, can serve to extinguish its character as "duty of any kind." All absences of an officer from his organization for duty of any kind are within the terms of the proviso.

In the light of what is stated above I answer your second inquiry as follows: The use of the word "actually" in connection with the phrase "present for duty" requires that the phrase should be construed literally—that is, that the officer should be present *on* duty with one of the organizations prescribed, in the sense that he is *in a regular and normal duty status* with respect thereto, although it may at times be impracticable for him actually to perform every duty normally pertaining to the status—and, therefore, as excluding an officer who, although physically present at the post or station where his troop, battery, or company is serving, is separated from duty therewith by an order assigning him to other duties, notwithstanding he may be available *for* such duty in the sense that an order from his immediate commander would restore him to such duty.

Applying the conclusions I have reached to your third and fourth inquiries, I answer as follows:

(a) That an officer of company grade under compliance with orders to perform any of the descriptions of duty mentioned in said inquiries is not to be considered as actually present for duty with a troop, battery, or company; provided, always, that the order assigning him to such duties operates to relieve him from the performance of duty with his proper organization; excepting the officer who commands a detached portion of his troop, battery, or company, who must under those conditions be held, I think, to be actually present for duty with his organization.

(b) That an officer of company grade who is sick in quarters, or in hospital at his post or elsewhere, or in quarantine at the station where his organization is on duty or elsewhere, or in compliance with summons from a civil or military court, or in arrest, or undergoing trial, or traveling in compliance with orders to change station from one company assignment to another, or absent with leave, though not "actually present for duty" with his organization, is not to be con-

sidered as detached from his organization "for duty of any kind" in such sense as to bring into operation the penalty clause of the proviso.

(c) The status of "awaiting orders" is an exceptional one in our service, and the attendant circumstances in each case must be relied upon to determine whether the placing of the particular officer in that status may or may not bring into operation the penalty clause of the proviso.

As a matter of administration I have to advise you further that the effect of the proviso is to require that an accounting shall be opened up with all line officers of company grade under the two headings, viz, "actually present for duty with a troop, battery, or company," and "detached from a troop, battery, or company for duty of any kind." The first account will reveal the officer's eligibility for detached service; the second will reveal the field application of the penalty clause of the statute. The accounting will also reveal a third status of officers of company grade in which they are neither "actually present for duty" with a troop, battery, or company, nor detached therefrom "for duty of any kind." Such absences from duty with a company will prevent the officers from accumulating eligibility for detached service, but will not furnish any occasion for the application of the penalty clause of the proviso.

In answering as above I have not been unmindful of the inconveniences which will flow from enforcing the proviso in the sense I have construed it, nor of the extent to which the normal execution of other laws relating to the Military Establishment may be obstructed thereby. The inconveniences are of a sufficiently serious character to justify, under accepted canons of construction, the most careful scrutiny of the proviso for the purpose of ascertaining whether there is not some other construction, permissible under its letter and spirit, by which these inconveniences may be avoided. But whenever I have attempted in this way to read into the proviso an exception of any duty the principle involved would have required the inclusion of a large class of duties which would result in defeating to a considerable extent its obvious purpose. However, the most careful scrutiny of the proviso and study of the service conditions to which it must apply convince me that there are no insuperable obstacles to administering it according to the plain and obvious import of its words; that we have to deal with nothing more serious than inconveniences, and perhaps some increase in the expense of maintaining the Army incident to the fact that under the terms of law the number of officers eligible for detachment for duty is so reduced as to necessitate, in all probability, numerous details for less than the maximum period prescribed or authorized by law and regulations. But I do not think that the obvious purpose in view in the enactment of this legislation should be restricted or hampered by giving controlling effect to inconveniences which are incident to literal construction and strict enforcement. In the light of the history of this legislation, and considering the unequivocal and emphatic language which Congress has employed, I am compelled to conclude that the inconveniences referred to were well within the contemplation of Congress and the intent was deliberate to face the possibility of their incurrence with whatever additional expense was incident

thereto, in order to avoid what was conceived to be greater inconveniences with resulting greater detriment to the service incident to the continuance of a system under which officers may pass through the company grade with insufficient service with their organizations.

E. H. CROWDER,
Judge Advocate General.

[Fourth indorsement.]

WAR DEPARTMENT,
JUDGE ADVOCATE GENERAL'S OFFICE,
October 14, 1912.

To the CHIEF OF STAFF.

1. In the foregoing letter, dated September 4, 1912, Capt. Mark L. Ireland, Coast Artillery Corps, after referring to the recent legislation respecting detached service, states, *inter alia*, that he was detailed for duty in the Ordnance Department from July 1, 1906, to October 5, 1909; that on October 9, 1909, he complied with paragraph 13, S. O. No. 196, War Department, 1909, directing him to report to the commanding officer of the Artillery District of the Columbia, for staff duty; that from about February 10 to September 2, 1910, he was attached to the One hundred and sixtieth Company, Coast Artillery Corps, under orders from the Artillery district commander; that he performed duty with the One hundred and sixtieth Company during the entire period of his attachment thereto, except from July 25 to August 24, 1910, during which period he was detached for duty as an umpire at the camp of instruction at American Lake, Wash.; that he was in command of said company from March 19 to April 26, 1910; that he is at present on duty as a student officer at the Coast Artillery School, Fort Monroe, Va.; and that if his "Ordnance service is not counted and credit is given for the company duty performed with the One hundred and sixtieth Company, Coast Artillery Corps," his status is such as to permit him to complete the advanced course in the Coast Artillery School.

2. The legislation referred to above is found in the Army appropriation act of August 24, 1912 (37 Stat., 571), as amended by a joint resolution of August 24, 1912 (37 Stat., 645), and, in so far as material to the present inquiry, reads as follows:

(1) "*Provided*, That on and after December fifteenth, nineteen hundred and twelve, in time of peace whenever any officer holding a permanent commission in the line of the Army with rank below that of major shall not have been actually present for duty for at least two of the last preceding six years with a troop, battery, or company of that branch of the Army in which he shall hold said commission such officer shall not be detached nor permitted to remain detached from such troop, battery, or company for duty of any kind;

(2) "and all pay and allowances shall be forfeited by any superior for any period during which, by his order, or his permission, or by reason of his failure or neglect to issue or cause to be issued the proper order or instructions at the proper time, any officer shall be detached or permitted to remain detached in violation of any of the terms of this proviso;

(3) "but nothing in this proviso shall be held to apply in the case of any officer for such period as shall be actually necessary for him,

after having been relieved from detached service, to join the troop, battery, or company to which he shall belong in that branch in which he shall hold a permanent commission;

(4) "nor shall anything in this proviso be held to apply to the detachment or detail of officers for duty in the Judge Advocate General's Department or in the Ordnance Department, or in connection with the construction of the Panama Canal until after such canal shall have been formally opened, or in the Philippine Constabulary until the first day of January, nineteen hundred and fourteen, or to any officer detailed or who may be hereafter detailed for aviation duty."

3. Capt. Ireland's letter raises two questions, which may be stated as follows:

First. In view of the detached-service provision of the act of August 24, 1912, does a captain or lieutenant of the line by serving under detail in the Ordnance Department accumulate ineligibility for detached service in general?

Second. Is a captain or lieutenant of the line who, under an order attaching him to a troop, battery, or company of the branch in which he is commissioned, actually serves with such organization "actually present for duty * * * with a troop, battery, or company" within the meaning of the detached-service provision of the act of August 24, 1912?

4. In connection with the first question raised by Capt. Ireland, he suggests that while one evident purpose of the clause "nor shall anything in this proviso be held to apply to the detachment or detail of officers for duty * * * in the Ordnance Department * * *" is to avoid hampering the department in securing the services of officers for detail therein, the language used has a broader meaning and requires that the clause be construed so as to prevent service under detail in the Ordnance Department from rendering an officer ineligible for detached service in general.

5. As I construe the statutory provision quoted in paragraph 2 hereof, the first clause prescribes in sweeping terms that no captain or lieutenant of the line shall be detached or permitted to remain detached for duty of any kind from a troop, battery, or company of the branch in which he is commissioned unless he shall have been actually present for duty with such troop, battery, or company for at least two of the last preceding six years; and the second clause prescribes a penalty to be suffered by any superior who directs the detachment of an officer or permits him to remain detached from a troop, battery, or company in violation of the rule laid down in the first clause; while the third and fourth clauses provide that neither the rule which forbids the detachment of an officer or his remaining detached nor the rule which prescribes a penalty shall be operative when the reason for which the detachment is ordered or continued is for the purpose of enabling an officer relieved from detached service to join a troop, battery, or company, or for the purpose of employing an officer in the manner specified in the fourth clause. This construction gives full force and effect to the clauses "but nothing in this proviso shall be held to apply to * * *" and "nor shall anything in this proviso be held to apply to * * *"; for thus construed the provision permits an officer to remain detached from "a troop, battery, or company" while en route from a de-

tached-service station to the station of his organization or while detailed for duty in the Ordnance Department or for any other duty specified in the fourth clause. The blotting out of the provision when the assignment of an officer to any duty described in the third or fourth clause or his continuation on such duty is in question meets every requirement of the language employed in those clauses. On the other hand, to hold that the third and fourth clauses have the effect of changing constructively the character of the duty therein mentioned so that such duty may be counted as duty "with a troop, battery, or company," or to hold that those clauses warrant disregarding or treating as nonexistent any time devoted to the duties described therein, to the end that any period of troop, battery, or company service not within the last preceding six years may be counted in determining general eligibility for detached service, would be to read into the clauses a meaning that the language employed does not import, and would be inconsistent with the requirement of the first clause, which makes actual presence for duty "with a troop, battery, or company" for a specified portion of the last preceding six years the test of general eligibility for detached service.

6. For the reasons stated, I am of the opinion that a captain or lieutenant of the line who serves under detail in the Ordnance Department thereby accumulates ineligibility for detached service in general; that in determining Capt. Ireland's eligibility to remain on duty as a student officer at the Coast Artillery School on and after December 15, 1912, and therefore away from a company of the Coast Artillery Corps for duty not of the kind specified in the third and fourth clauses of the detached-service provision of the act of August 24, 1912, the period of his service in the Ordnance Department within the last preceding six years must be taken into account, and that such service may not be treated as service with a company of the branch in which he is commissioned.

7. With reference to the second question raised by Capt. Ireland the following extract from an earlier opinion in which this office discussed at length the detached-service provision here under consideration is in point, viz:

"* * * In determining when officers who have been withdrawn from the performance of normal duty with a troop, battery, or company, including those so withdrawn by the orders of their immediate regimental or post commanders, may be treated as again 'actually present for duty' with a troop, battery, or company, the true rule is that when such an officer shall resume, pursuant to competent orders, such an actual relation to a company as will make him available without further orders to perform the usual duties of his grade with respect to said company, with the primary purpose of performing them, and therefore stands able and ready to perform them as they arise in the course of military administration, he is 'actually present for duty' with a troop, battery, or company within the meaning of the statute; and that anything short of this would be only a constructive presence and not a compliance with the proviso. If an officer is not thus present for duty with a troop, battery, or company then he is not actually present within the terms or intentment of the proviso if its words are not to be forced out of their evident meaning. I may add that I find nothing in the law which prevents

the assignment of additional duties to an officer of company grade provided it leaves him in the duty status to his organization as here defined." (6-124, Sept. 16, 1912.)

8. In applying the rule stated in the preceding paragraph it appears to me to be immaterial whether an officer is "assigned" to the troop, battery, or company with which he may be serving or "attached" thereto, provided the officer actually occupies the regular and normal duty status of his grade with respect to the organization. But in holding that an order of attachment to a company followed by the normal performance of duty therewith is the equivalent of a formal assignment to a vacancy in said company, I do not mean to be understood as holding that by attachment of an indefinite number of officers of company grade to a company, with division of the duties among them, the requirements of the law are met. The complement of officers for each troop, battery, and company has been fixed by statute. See sections 2 and 10, act of February 2, 1901 (31 Stat., 748 and 750), and sections 6 and 8, act of January 25, 1907 (34 Stat., 862). In the execution of the law this statutory complement may not be exceeded, except possibly under emergent or unusual conditions of the service calling for a commissioned personnel beyond the statutory complement; but to increase the number of officers with a company beyond the statutory complement for a company for the primary purpose of giving to the additional officers a company duty status would, in my opinion, clearly be an evasion of the statute.

9. The papers in reference do not present sufficient facts to justify me in expressing an opinion as to whether or not Capt. Ireland is entitled to credit as having been actually present for duty with a company, within the meaning of the detached-service provision, during the period he was attached to and performing duty in the One hundred and sixtieth Company, but the rule stated in the preceding paragraph will determine the matter when applied to the facts in the case.

E. H. CROWDER,
Judge Advocate General.

[First indorsement.]

WAR DEPARTMENT,
JUDGE ADVOCATE GENERAL'S OFFICE,
October 1, 1912.

To the CHIEF OF STAFF:

1. The accompanying memorandum from the War College Division, Office of the Chief of Staff, is referred by the Acting Chief of Staff, September 26, 1912, for opinion on the questions raised therein regarding the construction of certain provisions of section 2 of the Army appropriation act of August 24, 1912 (Public, No. 338), for the creation of an Army Reserve.

2. The section provides, *inter alia*, for all enlistments on and after November 1, 1912, to be for terms of seven years, "the first four years in the service with the organizations of which those enlisting shall form a part and, except as otherwise provided herein, the last three years on furlough and attached to the Army reserve hereinafter provided for."

Then follows seven provisos, which may be briefly referred to in their order as providing as follows:

First. For reenlistment for another period of seven years, *after four years' continuous service under any enlistment*, with final discharge from previous enlistment.

Second. For furlough to reserve upon written application "after three years' continuous service" in the discretion of the Secretary of War.

Third. For four years "as an enlistment period for computing continuous-service pay."

Fourth. For defining the "Army Reserve" as consisting of "all enlisted men who, *after having served not less than four years with the organizations of which they form a part*, shall receive furloughs," etc., and that "*when any soldier is furloughed to the reserve his accounts shall be closed, and he shall be paid in full to the date such furlough becomes effective.*"

Fifth. For the soldier under certain conditions, upon his written application, to "have the right of remaining with the organization to which he belongs until the completion of his whole enlistment without passing into the Reserve."

Sixth. For the final discharge, except as provided in the first proviso "or as now otherwise provided by law," only upon completion of full term of seven years; for reenlistment "for a further term of seven years under the same conditions in the Army at large, or, in the discretion of the Secretary of War, for a term of *three years in the Army Reserve*"; and for enlistment in the Army reserve for three years of any honorably discharged soldier with character "at least good and who has been found physically qualified for the duties of a soldier, if not over 45 years of age."

Seventh. For the summoning by the President, "in the event of actual or threatened hostilities * * * *when so authorized by Congress* * * * *all furloughed soldiers who belong to the Army Reserve to rejoin their respective organizations*, and during the continuance of their services with such organizations they shall receive the pay and allowances authorized by law for soldiers serving therein, and *any enlisted man who shall have reenlisted in the Army Reserve* shall receive during such service the additional pay now provided by law for the soldiers of his arm of the service in their second enlistment period. Upon reporting for duty and being found physically fit for service they shall receive a sum equal to \$5 per month for the months during which they have belonged to the reserve, as well as the actual cost of transportation and subsistence from their homes to the places at which they may be ordered to report for duty under such summons."

3. It will be noted that the fourth proviso defines the "Army Reserve" as consisting "of all enlisted men who, *after having served not less than four years with the organizations of which they form a part*, shall receive furloughs without pay or allowances until the expiration of their terms of enlistment," etc., while the second proviso gives the Secretary of War discretion to *furlough and transfer to the Army Reserve* "any enlisted man at the expiration of three years' continuous service * * * upon his written application," etc.; and the sixth proviso authorizes the reenlistment of men discharged at the expiration of the seven-year term, "in the discretion

of the Secretary of War, for a term of three years in the Army Reserve," and also authorizes the enlistment of any person who may have been discharged honorably from the Regular Army with character reported "at least good * * * *in the Army Reserve* for a similar term of three years." It is clear from the section as a whole that the Army Reserve consists of four classes, viz:

- (a) Those furloughed to the Reserve at the end of three years;
- (b) Those furloughed to the Reserve at the end of four years;
- (c) Those who reenlist in the Army Reserve at the expiration of their full term of seven years; and
- (d) Those who being honorably discharged soldiers of the Regular Army enlist in the Reserve as authorized in the sixth proviso.

The fourth proviso appears, therefore, to be only a partial definition of the Army Reserve and should be so regarded. The latter part of that proviso, however, broadly provides that "when any soldier is furloughed to the Reserve his accounts shall be closed and he shall be paid in full to the date such furlough becomes effective," and should, it is believed, be held to apply to soldiers furloughed and transferred at the end of three years as well as those furloughed and transferred at the end of four years. Treating the fourth proviso as a partial definition only, there appears to be no occasion to further consider the question of conflict between the second and fourth provisos.

4. It will be convenient to consider the second and third questions together, viz:

"(2) Do men who enlist or reenlist in the Army Reserve form a class different from the Army Reserve composed of furloughed soldiers, and after enlisting or reenlisting in the Army Reserve are they to be considered as belonging to a particular organization and as on furlough from that organization?"

"(3) Does the term 'furloughed soldier,' on line 42, page 25 (Public, No. 338), include all classes of reserves, i. e., those whose enlistment has not yet expired and those who have enlisted or reenlisted in the Army Reserve?"

It will be observed that the statute, while providing for an Army Reserve, does not make any provision for its organization as such, nor does it provide for the men authorized to be "enlisted in the Army Reserve" to be attached to particular organizations of the Regular Army. The second and fourth provisos authorize soldiers to be furloughed and transferred to the Army Reserve *without discharge* after three and four years, respectively, to serve out their enlistments in the Reserve; the fourth proviso referring to the soldiers transferred after four years' service as forming "a part" of their respective organizations; and the seventh proviso is that "in the event of actual or threatened hostilities the President, when so authorized by Congress, may summon *all furloughed soldiers that belong to the Army Reserve to rejoin their organizations.*"

Taking these several provisions together, it would seem that the statute contemplates that soldiers furloughed and transferred to the Reserve are to be regarded as on furlough from their respective organizations, although they can not be called upon "to rejoin their respective organizations" except "in the event of actual or threatened hostilities * * * when so authorized by Congress." The sixth proviso authorizes reenlistments and enlistments *in the Army Re-*

serve, which, as already constituted, is not organized; and as already constituted there is no provision for the men so enlisted to be attached to any particular organization of the Regular Army. I am therefore of opinion that the men who reenlist or enlist in the Army Reserve form a class different from the furloughed soldiers in that they are not regarded as in any sense belonging to any organization, but simply to the unorganized Army Reserve. I am further of opinion that the term "furloughed soldiers" in the seventh proviso refers only to those whose enlistments have not yet expired—that is, to those who have been furloughed and transferred to the Reserve as authorized in the second and fourth provisos, and does not include those who have reenlisted or enlisted in the Army Reserve; but the effect of the following provisions, namely, "and any enlisted man who shall have reenlisted in the Army Reserve shall receive during such service the additional pay now provided by law for the soldiers of his arm of the service in their second enlistment period. Upon reporting for duty and being found physically fit for service, they shall receive a sum equal to \$5 a month for each month during which they shall have belonged to the Reserve, as well as the actual cost of transportation and subsistence from their homes to the places at which they may be ordered to report for duty under such summons," is to indicate that not only "furloughed soldiers who belong to the Reserve" but also those who shall have "reenlisted" or "enlisted" in the Reserve are to be subject to be summoned by the President for active duty "in the event of actual or threatened hostilities * * * when so authorized by Congress," and that when so summoned all will be under like obligation to report and serve in obedience to the summons.

5. In support of these views it may be observed that the seventh proviso appears to distinguish between soldiers covered by the term "all furloughed soldiers who belong to the Army Reserve" and those who have reenlisted "in the Army Reserve," in that the former "during the continuance of their service with such organizations * * * shall receive the pay and allowances authorized by law for soldiers serving therein," and that the latter "shall receive during such service the additional pay now provided by law for the soldiers of his arm of the service in their second enlistment period." While, therefore, the term "furloughed soldiers" appears to be limited to those who have been furloughed to the Reserve, without discharge, after three or four years' service, the provision respecting those who have "reenlisted in the Army Reserve," that they shall receive "*during such service* the additional pay now provided by law for the soldiers in his arm of the service in their second enlistment period," together with the concluding sentence providing for a bounty for members of the Reserve when reporting for duty "*under such summons*," clearly indicates a legislative intent that not only furloughed soldiers but *all* the members of the Army Reserve as well should be liable to be summoned under similar conditions. It may be further added that, while the statutory provision for summoning the Reserves is not very definite and complete, the summoning of the Reserves depends upon future authority from Congress, and such authority, when given, will include all the necessary incident powers to make the Reserve an effective body.

6. I would therefore answer the three questions submitted in the accompanying memorandum as follows:

(1) That the fourth proviso should be regarded as only a partial definition of the "Army Reserve," and that the section as a whole indicates that the Army Reserve includes, along with those furloughed at the end of four years, those furloughed on their applications at the end of three years, together with those who reenlist or enlist "in the Army Reserve" as authorized in the section.

(2) That the men who enlist or reenlist in the Army Reserve form a class different from the Army Reserve composed of furloughed soldiers only in respect to the fact that they do not enter the Reserve by way of furlough from particular organizations, and that the provision for their pay when summoned for active duty is somewhat different from that of soldiers furloughed to the Army Reserve, but that they are under the same obligations to report for service when summoned by the President, in the event of actual or threatened hostilities, when so authorized by Congress.

(3) That the term "furloughed soldiers" (line 42, p. 25, Public, No. 338) includes those who have been furloughed to the Reserve at the end of three or four years' service and whose enlistments have not yet expired, but does not include those who have reenlisted or enlisted in the Army Reserve. However, as stated in the answer to the second question, all classes of the Reserve are under like obligations to report for duty when summoned under authority of Congress as specified in the statute.

E. H. CROWDER,
Judge Advocate General.

[Second indorsement.]

WAR DEPARTMENT,
JUDGE ADVOCATE GENERAL'S OFFICE,
August 28, 1912.

To The ADJUTANT GENERAL.

It is clear that the Quartermaster Corps came into legal existence August 24, 1912, the date of the approval of the act which carried the provision for consolidation of the Quartermaster's, Subsistence, and Pay Departments. Thereafter no details to the grade of captain in said corps could be made or could become effective until the number of officers in that grade of said corps should be reduced from the present consolidated strength to 102. It follows that the detail of Capt. Smith, by paragraph 27, Special Orders, No. 177, dated July 29, 1912, to fill a vacancy August 31, 1912, is not operative under the conditions which have obtained since the enactment of the legislation for the consolidation above referred to. The period of 60 days which is provided for in the law for putting into effect the provisions of the act respecting consolidation is plainly for the purpose of organizing the administration of the new corps, but its effect is limited to that, and it does not postpone the creation of a new corps to a date later than the approval of the act.

E. H. CROWDER,
Judge Advocate General.

SEPTEMBER 3, 1912.

From: The Judge Advocate General.

To: The Chief of Staff.

Subject: Construction of section 3, act of August 24, 1912.

1. I have before me for remark a memorandum dated August 28, 1912, in which Maj. Gen. Aleshire, as Chief of the Quartermaster Corps, outlines certain steps which he desires to have taken at once with a view to carrying into effect the provisions of section 3 of the Army appropriation act approved August 24, 1912. That section, after providing for the consolidation of the office establishments of the Quartermaster General, the Commissary General, and the Paymaster General of the Army into a single bureau of the War Department, to be known as the Quartermaster Corps, and for the consolidation of the Quartermaster's, Subsistence, and Pay Departments of the Army into a single corps, to be known as the Quartermaster Corps of the Army, continues:

"And provided further, That for the purpose of carrying into effect the provisions of this section the President is hereby authorized to appoint, by and with the advice and consent of the Senate, the Chief of the Quartermaster Corps herein provided for immediately upon the passage of this act, and it shall be the duty of the said chief, under the direction of the President and the Secretary of War, to put into effect the provisions of this section not less than sixty days after the passage of this act."

2. While there may be an idiomatic use of the phrase "not less than," which in connection with the preceding portions of the section might support the view that the proviso quoted above amounts to a legislative mandate to complete the consolidation within the 60-day period, regard for the fact that the Secretary of War, under date of March 29, 1912, addressed to the chairman of the Senate Committee on Military Affairs a recommendation that "provision be made that a period of two months shall elapse between the approval of the act providing for the consolidation and the date upon which the consolidation shall be put into effect"; that this recommendation was followed by the introduction of a proviso substantially identical with the one here under consideration (Conference Rept. No. 762, May 27, 1912, on H. R. 18956); that while some of the language employed in the proviso as reported by the conference committee on May 27 was subsequently substituted by other language (Conference Report of Aug. 21, 1912, on H. R. 25531), the clause "to put into effect the provisions of this section not less than sixty days after the passage of this act" was left unchanged; and that the proviso, when interpreted in accordance with the ordinary and literal signification of the terms used therein, may be construed as a response to and compliance with the request of the Secretary of War for a period of postponement, constrains me to take the view that the proviso should be construed as decreeing a postponement of the administrative execution of the consolidation for a period of 60 days, during which period the principal steps necessary to make the new office establishment and the new corps going concerns are to be taken, and that the administration of the affairs of the offices and

departments consolidated by the act may not be assumed by the new bureau and corps until 60 days after the approval of the act.

3. The acceptance of this view does not imply that the 60-day period is to be one of inaction in respect of the consolidation. On the contrary, every effort should be made in the meantime to assure the beginning of efficient administration under the provisions of the consolidation section at the close of the 60-day period or as soon thereafter as possible. To that end officers of the old Subsistence and Pay Departments may be directed to cooperate with the Chief of the Quartermaster Corps in making necessary preparations, and orders may issue prescribing the course of administration under the section and directing that the same be put into administrative operation upon a given date, which should, of course, be at the close of the 60-day period or as soon thereafter as practicable.

4. Consideration of the entire section leads to the view that in determining the point of time at which each of the several provisions of the section became effective or may become effective a distinction is to be observed between provisions of a nature to become effective by mere operation of law and those which require affirmative executive or administrative action to give them effect. Provisions falling in the first class became effective immediately upon the approval of the act, while those of the second class may not be placed in operation until 60 days after the approval of the act, except in so far as the final proviso of the section requires or authorizes executive action prior to the expiration of the 60-day period. That proviso authorized and required the immediate appointment of the Chief of the Quartermaster Corps, a step that has already been taken, and further authorizes and requires prompt executive preparation, to the end that the administration of affairs may be begun by the consolidated bureau and corps 60 days after the approval of the act or as soon thereafter as practicable.

5. The provision changing the official designations of officers of the Quartermaster's, Subsistence, and Pay Departments does not require the aid of affirmative executive action to make the change effective. That provision therefore took effect upon approval of the act. It is therefore proper to employ the new designations in respect of all officers of the old departments named above. However, as the affairs of the old departments must for a period of not less than 60 days after August 24, 1912, continue to be administered by the officers in charge and under the law in effect prior to the date mentioned, possible confusion and delay in the transaction of public business will probably be avoided by continuing the use, parenthetically, of the old official designations in addition to the new ones until administration by the consolidated corps takes the place of administration by the three separate departments included in the consolidation.

6. If before the expiration of the 60-day period vacancies should occur among the noncommissioned staff officers heretofore known as post quartermaster sergeants or post commissary sergeants, it would not be necessary to invoke the new law in order to find authority for making appointments to fill such vacancies, except in so far as the official designations of the positions are concerned. It is therefore my opinion that during the period in question such vacancies may be filled in conformity with the law and regulations hereto-

fore in force, except that the appointees would be designated as "quartermaster sergeants" instead of as "post quartermaster sergeants" or "post commissary sergeants." The same reasoning would apply to vacancies among the clerks heretofore known as Army paymasters' clerks, but who are now to be designated as "pay clerks."

7. With reference to the provision which authorizes the advancement to the grade of major of not to exceed six captains holding commissions in the Quartermaster Corps it is to be noted that the advancement thus authorized does not take place by operation of law. Affirmative executive action is a condition precedent to the advancement. The advancement of these officers is not a necessary element or incident of executive preparation to put the section into administrative operation at the expiration of the 60-day period. Furthermore, the specific authorization for the immediate appointment of the Chief of the Quartermaster Corps, in connection with what follows in the same proviso, impliedly forbids for a period of not less than 60 days other appointments the authority for which is found only in the section providing for the consolidation. The advancement of the captains, referred to, must therefore, in my opinion, be deferred until 60 days after the approval of the act.

8. The section also provides that no details to fill vacancies in the grade of colonel in the Quartermaster Corps shall be made until the number of officers of that grade shall have been reduced by a specified number; prescribes a similar rule respecting vacancies in the grades of lieutenant colonel, major, and captain, and then continues:

"Whenever the separation of a line officer of any grade and arm from the Quartermaster Corps shall create therein a vacancy that under the terms of this proviso can not be filled by detail, such separation shall operate to make a permanent reduction of one in the total number of officers of said grade and arm in the line of the Army as soon as such reduction can be made without depriving any officer of his commission."

While it is true that the occurrence of vacancies might be hastened by executive action, the number of vacancies necessary to effect the prescribed reduction is bound to develop in the course of time by reason of expirations of the statutory term of service under detail in a staff corps or department, retirements by operation of law, deaths, etc. As these provisions require no affirmative executive action under authority of the new law to give them effect, but constitute an inhibition upon executive action under specified circumstances, I am of the opinion that said provisions became effective upon the approval of the act, and that no details to fill vacancies in any grade in the Quartermaster Corps may be made or permitted to become effective until after the required reduction in such grade shall have been accomplished. Details to the old Quartermaster's, Subsistence, and Pay Departments may of course no longer be made or permitted to become effective.

9. After the consolidation becomes administratively effective officers now bonded as officers of the Quartermaster's, Subsistence, or Pay Departments may be called upon to perform duties beyond the scope of their present duties, or to handle money or property that

would not have come into their hands under the law in force at the time their bonds were secured. It is accordingly recommended that steps be taken to assure that before entering upon his duties under the consolidation each officer of the new corps shall be bonded as such.

10. The remarks contained in paragraph 6, *supra*, are in response to a memorandum dated August 30, 1912, from the Chief of the Quartermaster Corps, and a memorandum of the same date from the office of the Commissary General. Those papers, as well as the paper mentioned in paragraph 1, *supra*, are returned herewith.

E. H. CROWDER,
Judge Advocate General.

[Third indorsement.]

WAR DEPARTMENT,
JUDGE ADVOCATE GENERAL'S OFFICE,
October 2, 1912.

To The ADJUTANT GENERAL.

1. In an indorsement dated September 13, 1912, with reference to a request made under date of September 10, 1912, by Capt. Frederick H. Pomroy, theretofore commissioned as captain in the Subsistence Department, to be promoted to the grade of major in the Quartermaster Corps, *vice* Maj. Beecher B. Ray, paymaster, promoted on August 27, 1912, to be deputy paymaster general, with the rank of lieutenant colonel, from February 16, 1912, this office said in part:

"5. The memorandum accompanying the request for decision raises the further question of whether Capt. Pomroy could be promoted to the Ray vacancy 'subject to examination' under the provisions of section 32 of the act of February 2, 1901. I am clearly of the opinion that he may not be so promoted. That section gives this right only when exigencies of the service require an officer to remain absent from any place where the examining board could be convened, but this condition is not shown to exist in the case of Capt. Pomroy." (6-224.)

2. The papers in reference on September 13, 1912, have been referred to this office for further remark in connection with a letter from Capt. Pomroy, in which he states, under date of September 18, 1912, that he was ordered to Chicago on April 2, 1912, for examination for promotion; that the medical members of the board held that he was incapacitated for active service by reason of disability incident thereto and would probably have to be retired, but in view of the possibility of his recovery they recommended that he be sent to some general hospital for observation and treatment; and that at the Walter Reed General Hospital the medical officers, after more than four months' observation and treatment of Capt. Pomroy, recommended that he be given four months' sick leave, on the theory that the physical disability from which he was suffering was not organic and that he would entirely recover therefrom and be fit for active service. It is understood that Capt. Pomroy is at present on sick leave, granted in view of the conditions just stated. He urges that these facts are sufficient to warrant his promotion subject to examination. None of these facts appeared in the papers before me when the indorsement of September 13, 1912, was prepared.

3. Section 32 of the act of February 2, 1901 (31 Stat., 756), provides:

"That when the exigencies of the service of any officer who would be entitled to promotion upon examination require him to remain absent from any place where an examining board could be convened the President is hereby authorized to promote such officer, subject to examination, and the examination shall take place as soon thereafter as practicable. If upon examination the officer be found disqualified for promotion he shall, upon the approval of the proceedings by the Secretary of War, be treated in the same manner as if he had been examined prior to promotion."

4. In the papers before me on September 13 there was nothing to show the existence of an exigency of the service of Capt. Pomroy which would prevent him from appearing before an examining board. If the case under consideration were one of first impression, I should be strongly inclined to take the view that the facts now shown to exist in Capt. Pomroy's case are not sufficient to bring it within the terms of section 32 of the act of February 2, 1901, so as to authorize his promotion subject to examination. However, my predecessor on June 29, 1908, in construing section 32, *supra*, said:

"When an officer is suffering from wounds, disease, or sickness which require him to remain absent from any place where an examining board could be convened, or, what is the same thing, if such temporary disability is such as to prevent him, in the opinion of the proper medical authority, from appearing at the place designated in appropriate military orders for his examination, clearly an exigency of the service exists which makes it impossible for him to so appear, and the statute becomes fully applicable to his case.

"The wrong for which a remedy is sought * * * consists in the difficulty which has been encountered in the expeditious advancement of officers who have been found qualified for promotion, due to the fact that an officer whose right to advancement had accrued was unable, on account of sickness, to undergo the examination required by law. It is believed that the enactment above cited applies an adequate remedy to the case presented.

"It is therefore the opinion of this office that where an officer whose right to promotion has accrued in the operation of the act of October 1, 1890, is obliged by reason of sickness to remain absent from the place where a board for his examination has been convened by the President, such sickness, when verified by the proper medical authority, constitutes an exigency of the service within the meaning of section 32 of the act of February 2, 1901, and that such officer may therefore be lawfully advanced to the next highest grade subject to examination, which shall take place as soon thereafter as practicable * * *." (C., 23096.)

Furthermore, in the preceding indorsement, dated September 21, 1912, The Adjutant General's Office says that "It has been the administrative practice to construe the provisions of section 32 of the act of February 2, 1901, providing for promotion subject to examination, as covering the cases of officers unable to appear before the examining board in due season by reason of physical disability or absence abroad, etc., and where delay in the promotion of an officer would block for a considerable period the promotion of his juniors, whose right to promotion had already accrued"; and then cites a

recent case in point—that of Lieut. Felker, of the Cavalry, who appears to have been promoted, subject to examination, while on sick leave.

5. In view of the opinion of June 29, 1908, *supra*, which no doubt had the approval of the Secretary of War, and of the administrative practice mentioned in the indorsement of September 21, 1912, from The Adjutant General's Office, I am constrained to express the opinion that under the conditions shown to exist in Capt. Pomroy's case he may, if those conditions still exist when his right to promotion shall have accrued, be promoted, subject to examination as provided for in section 32 of the act of February 2, 1901.

6. Capt. Pomroy's request of September 10 raised the question as to whether an officer heretofore commissioned in the Subsistence Department may, under the provisions of section 3 of the act of August 24, 1912 (Public, No. 338), be promoted to a vacancy in the next higher grade occasioned in the Quartermaster Corps by the promotion of an officer theretofore holding a commission in the Pay Department, and specifically whether or not Capt. Pomroy, being the senior captain on the permanent list of officers of the departments included in the consolidation prescribed by said section 3, may be promoted to the grade of major in the Quartermaster Corps to fill a vacancy occasioned by the promotion of Maj. Beecher B. Ray, paymaster, to the grade of lieutenant colonel, that promotion having been made on August 27, 1912, with rank from February 16, 1912. There being no captain on the permanent list of officers of the former Pay Department, it was held that Capt. Pomroy may be promoted to the vacancy in question, but that the right to promotion can not be held to antedate the approval of the act providing for the establishment of the Quartermaster Corps August 24, 1912. (J. A. G. O., 6-224, Sept. 13, 1912.) Upon further consideration I have arrived at the conclusion that the right of an officer commissioned as a captain in the Subsistence Department to be promoted to the grade of major in the Quartermaster Corps, under the conditions stated, not only can not antedate the approval of the act of August 24, 1912, but can not be held to antedate the time at which section 3 of that act becomes administratively effective.

7. The concluding provision of the section referred to in the preceding paragraph reads as follows:

"And provided further, That for the purpose of carrying into effect the provisions of this section the President is hereby authorized to appoint, by and with the advice and consent of the Senate, the Chief of the Quartermaster Corps herein provided for immediately upon the passage of this act, and it shall be the duty of the said chief, under the direction of the President and the Secretary of War, to put into effect the provisions of this section not less than sixty days after the passage of this act."

Concerning that section this office, under date of September 3, 1912, in an opinion which received the approval of the Acting Secretary of War, remarked in part as follows:

"In determining the point of time at which each of the several provisions of the section became or may become effective, a distinction is to be observed between provisions of a nature to become effective by mere operation of law and those which require affirmative executive or administrative action to give them effect. Provisions

falling in the first class become effective immediately upon the approval of the act, while those of the second class may not be placed in operation until 60 days after the approval of the act, except in so far as the final proviso of the section requires or authorizes executive action prior to the expiration of the 60-day period.

* * * * *

"With reference to the provision which authorizes the advancement to the grade of major of not to exceed six captains holding commissions in the Quartermaster Corps, it is to be noted that the advancement thus authorized does not take place by operation of law. Affirmative executive action is a condition precedent to the advancement. The advancement of these officers is not a necessary element or incident of executive preparation to put the section into administrative operation at the expiration of the 60-day period. Furthermore, the specific authorization for the immediate appointment of the Chief of the Quartermaster Corps in connection with what follows in the same proviso impliedly forbids, for a period of not less than 60 days, other appointments the authority for which is found only in the section providing for the consolidation. The advancement of the captains referred to must therefore, in my opinion, be deferred until 60 days after the approval of the act." (6-224.)

8. The considerations leading to the view that the six captains for the advancement of which special provision is made in the act providing for the establishment of the Quartermaster Corps may not be advanced in grade within the 60-day period immediately following the approval of the act, or until section 3 of the act is put into administrative operation, have equal force in precluding the promotion of a captain of the Subsistence Department to fill a vacancy occasioned in the grade of major by the promotion or retirement of a major in the old Pay or Quartermaster's Department. Capt. Pomroy, for example, has no present right to promotion to the grade of major as an officer of the Subsistence Department, there being no vacancy above the grade of captain in that department. The law in force prior to August 24, 1912, can not therefore be invoked as warrant for Capt. Pomroy's promotion at this time. His promotion could take place only by virtue of section 3 of the act of August 24, 1912, but the provisions of that section can, at the present time, be invoked as authority for administrative action only in so far as such administrative action is necessary by way of preparation to put the entire section into administrative operation on or after the expiration of 60 days after the approval of the act, and Capt. Pomroy's promotion is not a necessary element or incident of such preparation.

9. The administration of the affairs of the old Quartermaster's, Subsistence, and Pay Departments is now proceeding under the law in force prior to the approval of the act of August 24, 1912, except in so far as the official designations of officers belonging to those departments may have been changed by that act. Capt. Pomroy, as an officer of the old Subsistence Department, is invested with certain powers and duties. Should he be appointed a major in the Quartermaster Corps, he would vacate his present office and cease to be vested with the power to perform the duties of that office.

The Quartermaster Corps, as such, has not as yet become vested with administrative powers and duties, and with no warrant for official action beyond an appointment in the Quartermaster Corps this officer would, in my opinion, be without legal powers and duties until section 3 is put into administrative operation. It can not be supposed that Congress intended to bring about such a condition of affairs.

10. I am accordingly of the opinion that the promotion of Capt. Pomroy to the grade of major, *vice* Ray, as well as the advancement of the captains for which special provision is made in section 3 of the act of August 24, 1912, must be deferred until the date upon which said section 3 is put into administrative operation, and that the rank of said officers as majors in the Quartermaster Corps can not antedate the latter date. The same reasoning and the same conclusions apply in the case of a promotion to fill the vacancy caused by the retirement on September 11, 1912, of Maj. Daniel W. Arnold of the old Quartermaster's Department.

E. H. CROWDER,
Judge Advocate General.

OCTOBER 8, 1912.

From: The Judge Advocate General.

To: The Chief of Staff.

Subject: Absorption of officers, pursuant to section 3 of the act of August 24, 1912.

1. I have before me a memorandum in which, under date of October 7, 1912, the Acting Chief of Staff requests an opinion as to the date upon which that portion of the recent legislation consolidating the Quartermaster's, Subsistence, and Pay Departments which requires the absorption of a certain number of officers became or shall become effective.

2. The legislation referred to is found in section 3 of the act of August 24, 1912 (Public, No. 338), which, in so far as material to the present inquiry, reads as follows:

"SEC. 3. * * * The Quartermaster's, Subsistence, and Pay Departments of the Army are hereby consolidated into and shall hereafter be known as the Quartermaster Corps of the Army. The officers of said departments shall hereafter be known as officers of said corps and by the title of the rank held by them therein, and, except as hereinafter specifically provided to the contrary, the provisions of sections 26 and 27 of the act of Congress approved February 2, 1901, * * * are hereby extended so as to apply to the Quartermaster Corps in the manner and to the extent to which they now apply to the Quartermaster's, Subsistence, and Pay Departments, * * *: *Provided further*, That no details to fill vacancies in the grade of colonel in the Quartermaster Corps shall be made until the number of officers of that grade shall have been reduced by three, and thereafter the number of officers in that grade shall not exceed twelve; and no details to fill vacancies in the grade of lieutenant colonel in the Quartermaster Corps shall be made until the number of officers of that grade shall have been reduced by three, and thereafter the number of officers of that grade shall not exceed eighteen;

and no details to fill vacancies in the grade of major in the Quartermaster Corps shall be made until the number of officers of that grade shall have been reduced by nine, and thereafter the number of officers in said grade shall not exceed forty-eight; and no details to fill vacancies in the grade of captain in the Quartermaster Corps shall be made until after the number of officers of that grade shall be reduced by twenty-nine, and thereafter the number of officers of said grade shall not exceed one hundred and two; and whenever the separation of a line officer of any grade and arm from the Quartermaster Corps shall create therein a vacancy that, under the terms of this proviso, can not be filled by detail, such separation shall operate to make a permanent reduction of one in the total number of officers of said grade and arm in the line of the Army as soon as such reduction can be made without depriving any officer of his commission: * * * *And provided further*, That for the purpose of carrying into effect the provisions of this section the President is hereby authorized to appoint, by and with the advice and consent of the Senate, the Chief of the Quartermaster Corps herein provided for immediately upon the passage of this act, and it shall be the duty of the said chief, under the direction of the President and the Secretary of War, to put into effect the provisions of this section not less than sixty days after the passage of this act."

3. From the foregoing it appears that ultimately the authorized commissioned strength of the Quartermaster Corps in the grades from colonel to captain, both inclusive, is to equal the aggregate commissioned strength heretofore authorized in those grades for the Quartermaster's, Subsistence, and Pay Departments, less the following reductions, viz: Two colonels, 2 lieutenant colonels, 8 majors, and 28 captains; and that these reductions are to be effected by the cessation of details—details of the class made pursuant to the provisions of sections 26 and 27 of the act of February 2, 1901.

4. Concerning section 3 of the act of August 24, 1912, this office, under date of September 3, 1912, in an opinion which received the approval of the Acting Secretary of War, remarked, in part, as follows:

"In determining the point of time at which each of the several provisions of the section became or may become effective, a distinction is to be observed between provisions of a nature to become effective by mere operation of law and those which require affirmative executive or administrative action to give them effect. Provisions falling in the first class became effective immediately upon the approval of the act, while those of the second class may not be placed in operation until 60 days after the approval of the act, except in so far as the final proviso of the section requires or authorizes executive action prior to the expiration of the 60-day period. * * *" (64-250.)

In the same opinion the proviso requiring the temporary cessation of details in order to effect the reductions mentioned above was discussed in the following terms:

"* * * While it is true that the occurrence of vacancies might be hastened by executive action, the number of vacancies necessary to effect the prescribed reduction is bound to develop in the course of time by reason of expirations of the statutory term of service under detail in a staff corps or department, retirements by operation

of law, deaths, etc. As these provisions require no affirmative executive action under authority of the new law to give them effect, but constitute an inhibition upon executive action under specific circumstances, I am of the opinion that said provisions became effective upon the approval of the act, and that no details to fill vacancies in any grade in the Quartermaster Corps may be made or permitted to become effective until after the required reduction in such grade shall have been accomplished. Details to the old Quartermaster's, Subsistence, and Pay Departments may, of course, no longer be made or permitted to become effective."

In an earlier opinion, dated August 28, 1912, this office held that the Quartermaster Corps provided for by section 3 of the act of August 24, 1912, came into legal existence on the date of the approval of the act, to the extent that no detail thereto in the grade of captain may be made or permitted to become effective until the number of captains in the consolidated corps shall have been reduced below 102. This view was expressed in answer to an inquiry as to whether paragraph 27, Special Orders, No. 177, War Department, July 29, 1912, detailing a captain of infantry to fill a vacancy to occur on August 31, 1912, in one of the three staff departments affected by the consolidation should be permitted to stand—the answer being that in view of the new legislation and of the fact that the number of captains in the consolidated corps exceeded 102, the order referred to must be held to be inoperative. (64-250.)

5. In terms the section providing for the establishment of the Quartermaster Corps speaks from the date of its approval, subject to the exceptions indicated in the concluding proviso of the section. As the provision prohibiting details until certain reductions shall have been accomplished requires no affirmative executive action to make the statutory direction effective, I am of the opinion, as indicated above, that said provision is not within the purview of the final proviso of the section, and therefore became effective at once upon the approval of the act—that is, on August 24, 1912.

6. Section 27 of the act of February 2, 1901 (31 Stat., 755), which is specifically referred to in the section here under consideration, reads as follows:

"That each position vacated by officers of the line, transferred to any department of the staff for tours of service under this act, shall be filled by promotion in the line until the total number detailed equals the number authorized for duty in each staff department. Thereafter vacancies caused by details from the line to the staff shall be filled by officers returning from tours of staff duty. If under the operation of this act the number of officers returned to any particular arm of the service at any time exceeds the number authorized by law in any grade, promotions to that grade shall cease until the number has been reduced to that authorized."

7. It thus appears that in the ordinary course of administration, when the commissioned strength of line and staff organizations is being maintained at the maximum authorized by law, an officer relieved from duty under detail to one of the staff departments becomes for the time being a supernumerary in his branch and grade unless another officer is at the same time detailed therefrom for duty in a staff department. In the present case when an officer is relieved from detail in any one of the three departments merged into the

Quartermaster Corps no detail, either to the old department or to the new corps, can be made until the required reductions shall have been accomplished. The result is that the officer so relieved becomes a supernumerary officer in the branch and grade in which he is commissioned; and under the terms of the last sentence of section 27 of the act of February 2, 1901, promotions to that grade and branch must cease until the number of officers therein has been reduced to the number authorized by law. As the prohibition against making details became effective on August 24, 1912, the concluding provision of section 27 of the act of February 2, 1901, became automatically operative at the same time in respect of all cases arising through the relief of officers who have been under detail in one of the three departments merged into the new corps and who can not be replaced by means of new details until the prescribed reductions shall have been effected.

8. By way of specific answer to the question presented in the memorandum referred to in paragraph 1 hereof, I have to say that in my opinion that part of section 3 of the act of August 24, 1912, which requires the absorption of a certain number of officers rendered surplus by the merging of the Quartermaster's, Subsistence, and Pay Departments into the Quartermaster Corps became effective on the date of the approval of the act—that is, on August 24, 1912.

E. H. CROWDER,
Judge Advocate General.

[Second indorsement.]

WAR DEPARTMENT,
JUDGE ADVOCATE GENERAL'S OFFICE,
October 16, 1912.

TO THE ADJUTANT GENERAL:

1. In the foregoing letter, dated October 10, 1912, the Chief of the Quartermaster Corps requests information "As to the proper procedure in filling vacancies in the position of quartermaster sergeant after November 1, the date fixed for the consolidation of the Quartermaster's, Subsistence, and Pay Departments to become effective."

2. The consolidation thus referred to is prescribed by section 3 of the Army appropriation act of August 24, 1912 (Public, No. 338). That section, in so far as it is material to the present inquiry, reads as follows:

"That the office establishments of the Quartermaster General, the Commissary General, and the Paymaster General of the Army are hereby consolidated and shall hereafter constitute a single bureau of the War Department, which shall be known as the Quartermaster Corps, and of which the Chief of the Quartermaster Corps created by this act shall be the head. The Quartermaster's, Subsistence, and Pay Departments of the Army are hereby consolidated into and shall hereafter be known as the Quartermaster Corps of the Army. * * * The noncommissioned officers now known as post quartermaster sergeants and post commissary sergeants shall hereafter be known as quartermaster sergeants; * * * and each of said non-commissioned officers * * * shall continue to have the pay, allowances, rights, and privileges now allowed him by law: * * *

Provided further, That such duty or duties as are now required by law to be performed by any officer or officers of the Quartermaster's, Subsistence, or Pay Departments shall hereafter be performed by such officer or officers of the Quartermaster Corps as the Secretary of War may designate for the purpose; * * *."

The qualifications and methods of selection and appointment of post commissary sergeants and posts quartermaster sergeants have heretofore been determined by the following statutory provisions, viz:

"The Secretary of War is authorized to select from the sergeants of the line of the Army who shall have faithfully served therein five years, three years of which in the grade of noncommissioned officers, as many commissary sergeants as the service may require, not to exceed one for each military post or place of deposit of subsistence supplies, whose duty it shall be to receive and preserve subsistence supplies at the posts, under the direction of the proper officers of the Subsistence Department, and under such regulations as shall be prescribed by the Secretary of War. * * *." (Sec. 1142, Rev. Stat.)

"That the Secretary of War is authorized to appoint, on the recommendation of the Quartermaster General, as many post quartermaster sergeants, not to exceed eighty, as he may deem necessary for the interests of the service, said sergeants to be selected by examination from the most competent enlisted men of the Army who have served at least four years and whose character and education shall fit them to take charge of public property and to act as clerks and assistants to post and other quartermasters. Said post quartermaster sergeants shall, so far as practicable, perform the duties of storekeepers and clerks in lieu of citizen employees * * *." (Act of July 5, 1884, 23 Stat., 109.)

The designation of the commissary sergeants provided for in section 1142, Revised Statutes, was changed to post commissary sergeants and those noncommissioned officers included in the Subsistence Department by the terms of section 17 of the act of February 2, 1901, and the authorized number of post quartermaster sergeants was incorporated into the Quartermaster's Department by section 16 of the same act (31 Stat., 751 and 752). The first section of the Army appropriation act of August 24, 1912, *supra*, carries appropriations "for pay of two hundred post quartermaster sergeants, at forty-five dollars per month each, * * *," and "for pay of two hundred and seven post commissary sergeants, at forty-five dollars per month each, * * *."

3. The act of August 24, 1912, does not specifically provide for the repeal of any portion of section 1142, Revised Statutes, or of the act of July 5, 1884, neither does the former act in terms prescribe the qualifications and methods of selection and appointment of quartermaster sergeants in the Quartermaster Corps. I have discovered no such inconsistency between the new legislation and the legislation relating to the qualifications and methods of selection and appointment of post quartermaster sergeants and post commissary sergeants as would justify me in holding that the latter is repealed by implication. On the contrary, as after the consolidation becomes effective quartermaster sergeants will be liable to be called upon to perform the duties *and* assume the responsibilities of either or both of the old classes of

noncommissioned officers, I think it may be fairly assumed that the legislative intention was that new appointees to the position of quartermaster sergeant in the Quartermaster Corps should meet all the requirements of the laws designed to secure the selection of properly qualified post quartermaster sergeants and post commissary sergeants, respectively. This construction would continue to give effect to the old legislation enacted for the purpose of securing competent noncommissioned officers in the supply departments merged into the new corps, and would be in harmony with the rule that repeals by implication are not favored and will not be held to exist if there is any other reasonable construction.

4. For the reasons stated I am led to the opinion that after the consolidation recently prescribed becomes effective section 1142 of the Revised Statutes and the act of July 5, 1884, *supra*, should be given effect in respect of the qualifications and methods of selecting new appointees to the position of quartermaster sergeant in the Quartermaster Corps by observing all requirements common to both statutes or found in one with no corresponding provision in the other and by requiring the higher qualification and observing the more restricted field of selection when the two statutes contain different provisions upon the subject.

E. H. CROWDER,
Judge Advocate General.

[Second indorsement.]

WAR DEPARTMENT,
JUDGE ADVOCATE GENERAL'S OFFICE,
September 14, 1912.

To the SECRETARY OF WAR:

1. The Chief of the Quartermaster Corps submits his views relative to the construction of section 4 of the Army appropriation act of August 24, 1912, providing for the substitution in large measure of an enlisted force for the Quartermaster Corps to replace the civilians now employed in that corps and the enlisted men now on detail on extra duty in said corps, with request that the opinion of this office be obtained regarding certain provisions thereof.

2. Section 4 of the said act directs that as soon as practicable after the creation of the Quartermaster Corps "not to exceed" 4,000 civilian employees of that corps, receiving a monthly compensation of not less than \$30 nor more than \$175 each, "*not including*" certain employees or classes of employees specified "shall be replaced permanently by not to exceed an equal number of enlisted men of said corps"; provides for the enlistment of not to exceed 2,000 men for said corps to replace details therein for extra duty; and for the purpose of the act authorizes the enlistment of "*not to exceed*" 6,000 men of the several grades provided for with pay of the corresponding grades in the Signal Corps, the enlisted force so authorized to be permanently attached to the Quartermaster Corps and not to be accounted for as a part of the enlisted force now authorized by law. The section divides the civilian force of the Quartermaster Corps into two classes: (1) Those to be replaced by enlisted men *as soon as practicable*, and (2) those referred to as "*not included*" or as "*excepted from the provisions of this act.*" This act authorizes the

enlistment of men to replace those within the former class, but gives no such authority in respect to those in the latter class. It provides that the Secretary of War may fix the limits of age within which "civilian employees who are actually employed by the Government when this act takes effect, and who are to be replaced by enlisted men under the terms of this act, may enlist in the Quartermaster Corps," indicating that, as to those included within the requirement to be replaced by enlisted men, the words "*as soon as practicable*" mean something more than a replacement as vacancies may occur. The act further provides that "*nothing in this section shall be held or construed so as to prevent the employment of the class of civilian employees excepted from the provisions of this act, or the continued employment of civilians included in the act until such latter employees have been replaced by enlisted men of the Quartermaster Corps.*"

3. The employees referred to in the section as "not included" in the requirement for replacement "*as soon as practicable*," and in the proviso as "*excepted from the provisions of this act*," are described as follows:

"Civil engineers, superintendents of construction, inspectors of clothing, clothing examiners, inspectors of supplies, inspectors of animals, chemists, veterinarians, freight and passenger rate clerks, *civil-service employees, and employees of the classified service*, employees of the Army transport service and harbor-boat service, and such other employees as may be required for technical work."

When the bill was originally introduced the underscored words were not in the bill, so that all the excepted employees were those "required for technical work." When the bill passed the House the words "employees of the classified service" had been added thereto, and later the words "civil-service employees" were added. In other respects the legislation as passed agrees substantially with the bill as originally introduced.

4. In considering this section the question arises whether it deals with persons as "excepted from" its provisions or with the positions filled by the persons. It provides for replacing "civilian employees" by enlisted men, "*not including*" those described and referred to in the proviso "*as excepted from the provisions*" of the act; and if the section be construed as excepting persons and not positions, then when a position within the excepted classes becomes vacant in the ordinary course, the act would authorize the position to be filled by an enlisted man, subject to the proviso that nothing in the section "*shall be construed so as to prevent the employment of the classes of civilian employees excepted from the provisions of this act*"; that is, the proviso would reserve to the department the discretion to employ civilians to fill vacancies in the excepted classes. So construed the proviso would limit the operation of the requirement to fill vacancies as they occur by enlisted men within the limit of the number authorized by reserving to the department authority to employ civilians if deemed necessary to fill the vacancy of any employee of the excepted classes. This construction would give scope for the operation of the act not only as to the number authorized, but also as to the apportionment of the authorized enlisted strength in the several grades; that is, 15 master electricians, 600 sergeants, 1,005 (should be 1,000) sergeants, 650 corporals, 2,500 privates (first

class), 1,190 privates, and 45 cooks. If, on the other hand, the section be regarded as excepting positions and not persons, then there is no authority to employ enlisted men except as to the classes not excepted from the operation of the section; and as the excepted classes include, along with the persons required for technical work, "civil-service employees and employees of the classified service," thus including nearly all of the employees of higher grades, the act would be in large part inoperative for want of persons or positions in respect to which it can operate. Moreover, as practically all of the higher salaries would pertain to the positions excepted, the provision for the higher grades among the enlisted men authorized would be unnecessary, since all of the positions of the classes calling for the higher grades would be excepted from the operation of the act. Furthermore, this construction would render the proviso wholly unnecessary, since, if the positions are excepted from the operation of this section, then, of course, they would continue to be filled as civil positions, there being no authority to fill them by enlistment.

5. I am therefore of opinion that Congress intended to except the *persons* described from the requirement that they should be replaced as soon as practicable by enlisted men, and that Congress had no intention to require the maintenance of the positions as civil positions. Realizing, however, that the character of service required as to some of the places at least might make it impracticable to fill them by enlisted men, Congress, by the proviso, reserved to the department authority to employ civilians to fill vacancies of the excepted classes instead of filling them by enlisted men, as would be required in the absence of the proviso.

6. In the second paragraph the Chief of the Quartermaster Corps enumerates certain classes of employees, "such as assistant wagon masters, cargadors, packers (with pack trains), teamsters, laborers (not classified), scavengers, etc.," none of which appear to belong to the classes excepted from the operation of the section. I concur in his view that these employees fall within the operation of the statute; but his recommendation in regard to the rules of enlistment to be established by the Secretary of War is one pertaining to administration and does not appear to call for any remark or recommendation by this office.

7. In the third and fourth paragraphs the Chief of the Quartermaster Corps draws distinction between certain employees required for technical work, whom he refers to as "excluded from enlistment" and as holding positions "which will have to be filled in future, as in the past, through the civil service," and other employees described in the exception as "civil-service employees and employees of the classified service," in respect to which he thinks the vacancies as they occur may properly be filled by enlisted men within the limits authorized. The language of the section does not admit of any distinction between the positions requiring technical qualifications and those in the civil or classified service, all being equally excepted from the requirement of the section regarding their replacement by enlisted men as soon as practicable. Whatever distinction may be required in the administration of the statute will have to be made by regulation under the authority to continue the "employment of the class of civilian employees excepted from the provisions" of the act. I am of opinion that under the authority of this proviso the Secre-

tary of War can properly direct that as to employees required for technical work of the classes specified vacancies as they occur will be filled in future, as in the past, through the civil service; but as to other employees within the excepted classes, described in the exception as "civilian employees and employees of the classified service," the vacancies will be filled by enlisted men within the limit of the number of enlisted men authorized.

E. H. CROWDER,
Judge Advocate General.

OCTOBER 18, 1912.

From: The Judge Advocate General.

To: The Adjutant General.

Subject: Additional members of the General Staff Corps.

1. In a communication of the 10th instant The Adjutant General of the Army states that the Secretary of War desires the opinion of this office as to "whether or not the Chief of the Coast Artillery Corps and the Chief of the Division of Militia Affairs are members of the General Staff Corps, in view of the provisions of section 5 of the act of August 24, 1912, making appropriations for the support of the Army, which limits the number of general officers of the corps to two, and of section 8 of said act, which repeals all laws and parts of laws so far as they are inconsistent with the terms of said act." The question is presented with sufficient definiteness to admit of an intelligent discussion and a satisfactory conclusion, without the necessity of further restatement for those purposes.

2. The office of Chief of Artillery was created by section 6 of the act of February 2, 1901 (31 Stat., 749), which also prescribes that that officer shall serve on the staff of the general officer commanding the Army. The act of Congress approved February 14, 1903 (32 Stat., 831), established the office of Chief of Staff and the General Staff Corps, and prescribed *inter alia* the powers and duties of said office and the composition and duties of said corps. Section 3 of said act provides:

"That the General Staff Corps shall consist of one Chief of Staff and two general officers, all to be detailed by the President from officers of the Army at large not below the grade of brigadier general, four colonels, six lieutenant colonels, and twelve majors, all detailed from the corresponding grades in the Army at large, under such rules for selection as the President may prescribe; twenty captains, to be detailed from officers of the Army at large of the grades of captain or first lieutenant, who while so serving shall have the rank, pay, and allowances of captain mounted. All officers detailed in the General Staff Corps shall be detailed therein for periods of four years unless sooner relieved. While serving in the General Staff Corps officers may be temporarily assigned to duty with any branch of the Army. Upon being relieved from duty in the General Staff Corps officers shall return to the branch of the Army in which they hold a permanent commission, and no officer shall be eligible to a further detail in the General Staff Corps until he shall have served two years with the branch of the Army in which commissioned, except in case of emergency or in time of war."

Section 5 of the same act also provides:

"That the Chief of Artillery shall hereafter serve as an additional member of the General Staff."

This latter provision appearing in the act creating the General Staff Corps was repeated *ipsisssimis verbis* in section 5 of the act of March 3, 1903 (32 Stat., 1071), and appears in its final form in section 2 of the act of January 5, 1907 (34 Stat., 861), as follows:

"That the Chief of Artillery or Chief of Coast Artillery shall be an additional member of the General Staff Corps and his duties shall be as prescribed by the Secretary of War."

Such was the state of the law defining the relation of the office of Chief of Artillery and of that officer to the General Staff Corps on the 24th day of August, 1912, when the act making appropriation for the support of the Army for the present fiscal year became law.

3. Section 5 of said act provides as follows:

"That hereafter the General Staff Corps shall consist of two general officers, one of whom shall be the Chief of Staff, four colonels, six lieutenant colonels, twelve majors, and twelve captains and first lieutenants, all of whom shall be detailed from the Army at large in the manner and for the periods prescribed by law: *Provided*, That hereafter, except as otherwise provided herein, when any officer shall, under the provisions of section 26 of the act of Congress approved February 2, 1901, be appointed to an office above that of colonel, his appointment to said office and his acceptance of the appointment shall create a vacancy in the arm, staff corps, or staff department from which he shall be appointed, and said vacancy shall be filled in the manner prescribed by existing law, but he shall retain in said arm, staff corps, or staff department the same relative position he would have held if he had not been appointed to said office, and he shall return to said relative position upon the expiration of said appointment to said office unless he shall be reappointed thereto; and if under the operation of this proviso the number of officers of any particular grade in any arm, staff corps, or staff department shall at any time exceed the number authorized by law, no vacancy occurring in said grades shall be filled until after the total number of officers therein shall have been reduced below the number authorized by law, but nothing in this proviso shall be held to apply in the case of any officer who now holds a four-year appointment to an office with rank above that of colonel, and whose return to the relative position he would have held if he had not been appointed to said office is not possible under existing law."

Said act also prescribes in its eighth and concluding section:

"That all laws and parts of laws, so far as they are inconsistent with the terms of this act, be and they are hereby repealed."

4. The question presented, then, requires that it be determined, as a result of the application of the rules of statutory construction, whether the recent act, which prescribes anew, in the section quoted, *supra*, the constitution of the General Staff Corps, including the number of general officers thereof and without mention of additional members, and a repeal of all prior inconsistent laws, operates thereby to repeal expressly or by fair implication the provisions of law theretofore existing and constituting the Chief of Coast Artillery an additional member of said corps.

5. The repealing effect of section 8 of the recent act may, I think, be ascertained and stated without difficulty. Such general repealing clauses are of common use in legislation which is not new in character, and which is but part of a system of legislation upon a common subject matter. Such a clause simply implies a legislative assumption that the new law may to some extent be repugnant to some parts of the antecedent legislation on the same subject. If this be so, there is a repeal to the extent of the irreconcilable difference, but no further; and this would be true by implication, regardless of the existence of such clause. It is a general rule, therefore, that the insertion of a general repealing clause adds nothing to the repealing effect of the statute. Section 8, then, of the recent act does not serve in and of itself to affect in any wise the question of the repeal of the antecedent provision that the Chief of Coast Artillery shall be an additional member of the General Staff Corps; nor does the repealing clause in question, taken in conjunction with section 5 of the same act, add anything to the repealing effect that the latter section in and of itself may have upon the antecedent provision referred to. Such provision is nowhere expressly repealed. It has been repealed, if at all, by implication; that is, by the legislative reconstitution of that corps in section 5 of the recent act which fails or omits to prescribe or provide for the additional membership in question.

6. Repeals by implication are not favored. Acts should be construed, if possible, so that all may be operative. However, subsequent legislation repeals previous inconsistent legislation upon the same subject and for similar purposes, not only on the theory of legislative intention, but because contradictions can not stand together. The intention to repeal, however, can not be assumed, nor a repealing effect admitted unless the inconsistency is unavoidable, and then only to the extent of the repugnance. If it is clear that in the present instance the mere affirmative enumeration in section 5 of the recent act of those officers of the several grades constituting the General Staff Corps is sufficiently strong to imply a negative, and thus furnish a rule of exclusion, or if it plainly appears to have been the purpose of Congress in said section to cover all antecedent acts prescribing the composition of that corps, and thus give expression to the whole law on the subject, or if said section is in any other manner irreconcilably repugnant to the antecedent separate statutes prescribing the additional membership, the existence of such conditions must attribute a repealing effect to said section; otherwise, and so long as different functions and purposes can be assigned to the several separate statutes, all must stand.

7. Of all branches of the Army the Coast Artillery Corps is the only one organized with a statutory chief. The statute originating the office of Chief of Artillery placed that officer upon the staff of the general commanding the Army. The statute which established the office of the Chief of Staff and the General Staff Corps and prescribed that the Chief of Artillery should be an additional member of said corps seems to be but a logical legislative continuation of the same relation. The relation thus established by statute has been maintained by two legislative repetitions (*vide*, act March 3, 1903, 32 Stat., 1021-2; sec. 2, act January 25, 1907, 34 Stat., 861); such repetitions, though made necessary by other considerations, serve, in and of themselves, to furnish suggestive force of fixedness of legislative

policy and intention. It is believed that the legislative intention in making the Chief of Artillery an additional member of the General Staff Corps was, upon the one hand, to supplement that corps with that officer, who by virtue of his office possesses a general and particular knowledge of his branch, in order that the General Staff Corps, thus availing itself, may the better perform its duties toward that branch, which differs largely in military functions and character from the other branches of the Army, and to the whole Army as well; and, upon the other hand, to establish the correct military and administrative relation of this office and officer to the Chief of Staff. Such intention is deducible not only from a review of the legislation upon the subject, but becomes particularly plain in the light of the practical administration of the office in question under the statutory status. The primary purpose of Congress was not, therefore, to increase the personnel of the General Staff Corps as such, nor the number of general officers to serve therewith, nor does the relation thus established decrease the number of officers available for actual service with troops. In such respects those provisions of law making the Chief of Artillery an additional member of the General Staff Corps appear to have no community of purpose with the section in the recent act reconstituting that corps.

8. It is true that in section 5 of the recent act Congress has prescribed for the constitution of the General Staff Corps a number of officers which, in the grades of general officer and of captain and first lieutenant differs from the quota of those respective grades prescribed by the act establishing that corps. But it has done so in affirmative language, without the use of words of negation or exclusion. Upon general principles a statute in affirmative terms, without negative words or words of exclusion, will not repeal existing statutes upon the same subject matter unless there is unavoidable repugnance. Had Congress intended to exclude the additional membership of the Chief of Coast Artillery, it would have been easy to do so by the use of the simplest words of negation and exclusion without even destroying the affirmative form. I feel satisfied that the mere enumeration of the officers constituting the General Staff Corps in the recent act is not sufficient to take the present instance from under the application of the general rule, and that to permit such an exclusive interpretation of mere numbers to prevail over the general intention of the provision will not be justified, in view of the antecedent legislation upon the same subject matter, but with a different purpose and function, and of the other reasons advanced herein.

9. If section 5 of the recent act clearly covers the whole subject matter of all antecedent acts respecting the composition of the General Staff Corps—that is, if it plainly appears to have been the purpose of Congress to give expression therein to the whole law on the subject—then it must be held that all such antecedent acts become repealed by necessary implication. The said section, after prescribing what officers shall constitute the General Staff Corps, provides that all of them “shall be detailed from the Army at large in the manner and for the periods prescribed by law.” It prescribes no rules governing the methods of detail, but evidently reverts for such terms, in part at least, to the old section establishing the Gen-

eral Staff Corps. The recent section, therefore, does not repeal by substitution the old section prescribing the constitution of the General Staff Corps, but has reference throughout to the officers *detailed* to constitute that corps. I am therefore fairly convinced that the recent act, wherein it prescribes the constitution of the General Staff Corps, does not intend to cover the entire composition of that corps, but only so much of it as consists of officers who are detailed thereto, excluding from its purview those officers whose relation thereto is based upon a status fixed *virtute officii*.

10. I have chosen, for convenience sake, to discuss first the question as it relates to the Chief of Coast Artillery. The same question is propounded as regards the additional membership of the Chief of the Division of Militia Affairs.

The business and affairs pertaining to the militia were transacted in the office of The Adjutant General prior to February 12, 1908; upon that date the Acting Secretary of War, by formal order, created in the office of the Secretary of War a division to be known as that of militia affairs, vested it with the transaction of all business pertaining to the militia, and specifically defined its jurisdiction. By General Orders 141, July 25, 1910, the Acting Secretary of War directed that under the provision of paragraph 775, Army Regulations, the Chief of the Division of Militia Affairs report to the Chief of Staff, who has supervisory power over all matters arising in the execution of the acts of Congress and Executive regulations made in pursuance thereof relating to the militia. Such was the intimate administrative relation between the chief of this division and the Chief of Staff when Congress, in the act of March 3, 1911 (36 Stat., 1037), gave statutory recognition to the former office and fixed its relation to the office of the Chief of Staff and to the General Staff Corps by providing:

"That hereafter the Chief of the Division of Militia Affairs, office of the Chief of Staff, shall be detailed from the general officers of the line of the Army, and while so serving shall be an additional member of the General Staff Corps."

The general purpose and intention of the above provision were in evident recognition of the general movement for the improvement of the militia and of the legislative and administrative activity toward bringing that force into more intimate relation and coordination with the War Department and the Regular Establishment. The specific purpose was, as in the case of the Chief of Coast Artillery, to supplement the General Staff Corps by that officer who represented the connection between the Regular Establishment upon the one hand and the militia upon the other, and who, because of his facility for acquiring special knowledge of this important branch of national defense and because of his official relation to the militia, could the better accomplish his own functions as chief of the division, the more effectively aid the General Staff in all questions affecting the relation of the militia to the department, and thus contribute to the cooperation and coordination desired. Upon the other hand, its specific purpose was also to fix the correct military and administrative relation of the office and officer to the Chief of Staff. Such being the general and special purpose of the statute in making the Chief of the Division of Militia Affairs an additional member of the

General Staff Corps, analogous in all respects to that of similar previous legislation in the case of the Chief of Coast Artillery, the reasoning advanced in the above discussion in the case of the latter officer is equally applicable and controlling in considering the relation of the Chief of the Militia Division to the General Staff Corps. So, too, in considering the question as respects both officers, I can not disregard the fact, which strengthens both cases, that Congress eight years after having made the Chief of Coast Artillery, as such, an additional member of the General Staff Corps created and for similar reasons another additional member of that corps by virtue of his office, which fact, coupled with the presumption in favor of the continuance of a relation once legislatively established, furnishes strong assurance in both cases of a fixed legislative intention and policy.

11. I am satisfied, in view of the reasons hereinbefore advanced, that by fair construction some office and function can be assigned to the statutes providing that the two officers in question shall be additional members of the General Staff Corps, as well as to the recent section in question prescribing the constitution of said corps, without derogation from any of them. The purpose of the former I have already sufficiently indicated, and the purpose of the latter is, by reducing the detailed members of the General Staff Corps, to render the officers thus relieved available for service where, as Congress deemed, they will be of greater use. Under such circumstances all the statutes must stand.

12. I therefore conclude that the provisions of section 5 of the act approved August 24, 1912, making appropriations for the support of the Army for the present fiscal year, do not affect the relations of the Chief of Coast Artillery and the Chief of the Division of Militia Affairs to the General Staff Corps, and that each of these functionaries still is, by virtue of his office, an additional member of that corps. The question submitted is answered accordingly.

E. H. CROWDER,
Judge Advocate General.

BULLETIN 1.

[Bulletin No. 25 is the last of the series of 1912.]

BULLETIN }
No. 1. }

WAR DEPARTMENT,
WASHINGTON, *January 20, 1913.*

The following digest of opinions of the Judge Advocate General of the Army for the period from October 1 to December 31, 1912, inclusive, and digests of certain decisions of the Comptroller of the Treasury and opinions of the Attorney General are published for the information of the service in general.

Bulletins similar to this one will hereafter be issued monthly at the end of each calendar month covering opinions and decisions for said month.

[1931376 B—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ABSENCE: Leaves of, to nurses in the Army Nurse Corps; commutation of subsistence and cumulative leave.

The act of March 23, 1910 (36 Stat., 249), which fixes the rates of pay of the Army Nurse Corps, provides that:

"All female nurses shall hereafter be entitled, * * * to cumulative leave of absence with pay at the rate of thirty days for each calendar year of service in said corps."

Appropriation is made in the Army appropriation act of August 24, 1912 (37 Stat., 578), for payments "of the regulation allowances for commutation in lieu of rations to * * * male and female nurses on leave of absence."

A female nurse of the Army Nurse Corps was absent on leave for 72 days, at the end of which time she applied for and received her discharge from the Nurse Corps. *Held*, that if at the time of said discharge she was entitled to cumulative leave for the period stated, commutation of subsistence for such period might be allowed her at the rate specified in the Army Regulations.

(6-227.2, J. A. G., Nov. 30, 1912.)

APPROPRIATIONS: Covering the surplus of permanent appropriations into the Treasury; International Waterways Commission, appropriation for in the act of March 4, 1911.

Section 4 of the river and harbor act of June 13, 1902 (32 Stat., 373), prescribed the organization and duties of the International Waterways Commission, and for the purpose of paying its salaries and expenses, authorized the Secretary of War to expend from the amounts theretofore appropriated.

"* * * for the Saint Marys River at the Falls, the sum of twenty thousand dollars, or so much thereof as may be necessary to pay that portion of the expenses of said commission chargeable to the United States."

Subsequently, appropriations were made annually for "continuing the work of investigation and report" of said commission, the last one being that contained in the sundry civil appropriation act of August 24, 1912 (37 Stat., 448), which appropriated a sum of money "for continuing until December thirty-first, nineteen hundred and twelve," such investigation and report, and provided for a report to Congress at its next session. Section 10 of the act of March 4, 1909 (35 Stat., 1027), required the Secretary of the Treasury to cause all unexpended balances of appropriations which remained on the books of the Treasury on the first day of July, 1904, except permanent specific appropriations and certain others mentioned, to be covered into the Treasury, and that for such purpose no appropriation made prior to said date should be regarded as a permanent specific appropriation unless by its terms it was made available until expended. *Held*, that the act of March 4, 1909, caused the appropriation theretofore made available for the commission by act of June 13, 1902, to be covered into the Treasury, so that the same is not now available for the purposes of said commission. *Held further*, that the appropriation in the sundry civil act of March 4, 1911 (36 Stat., 1407), for continuing the work and investigation of the commission is classed as permanent, and the unexpended balance thereof is available for the purposes of said commission after December 31, 1912.

(62-930, J. A. G., Dec. 18 and 23, 1912.)

ARMY ORGANIZATION: General Staff Corps; chiefs of the Coast Artillery Corps and of the Division of Militia Affairs.

The laws which created the offices of the Chief of Coast Artillery and the Chief of the Division of Militia Affairs provided that they should be considered as additional members of the General Staff Corps. The act of February 14, 1903 (32 Stat., 831), established the office of Chief of Staff and the General Staff Corps and prescribed the composition and duties of the same. Subsequently to the acts making the chiefs of the Artillery Corps and of the Division of Militia Affairs, respectively, additional members of the General Staff Corps, Congress by section 5 of the act of August 24, 1912 (37 Stat., 594), prescribed anew the composition of the General Staff Corps and specified the manner of details thereto. The eighth section repealed all laws inconsistent with the terms of said act. *Held*, that neither the repealing clause in said section 8, nor the provision prescribing anew the composition of the General Staff Corps and the manner of making details thereto, repealed the laws

constituting the Chief of the Artillery Corps and the Chief of the Division of Militia Affairs additional members of the General Staff, nor did such legislation affect their relations to the General Staff Corps; and that said officers continue to be such additional members.

(6-213, J. A. G., Oct. 18, 1912.)

ARMY RESERVE: Composition of; obligation to serve.

Section 2 of the Army appropriation act of August 24, 1912 (37 Stat., 590), prescribes, *inter alia*:

"That on and after November first, nineteen hundred and twelve, all enlistments in the Regular Army shall be for the term of seven years, the first four years in the service with the organizations of which those enlisting shall form a part, and, except as otherwise provided herein, the last three years on furlough and attached to the Army Reserve hereinafter provided for: * * *."

Then follow seven provisos, which, referred to by number in the order in which they appear, provide:

(1) * * *

(2) "That any enlisted man, at the expiration of three years' continuous service with such organizations, either under a first or any subsequent enlistment, upon his written application, may be furloughed and transferred to the Army Reserve, in the discretion of the Secretary of War, * * *:"

(3) * * *

(4) "That hereafter the Army Reserve shall consist of all enlisted men who, after having served not less than four years with the organizations of which they form a part, shall receive furloughs without pay or allowances until the expiration of their terms of enlistment, * * *:"

(5) * * *

(6) "That except upon reenlistment after four years' service or as now otherwise provided for by law, no enlisted man shall receive a final discharge until the expiration of his seven year term of enlistment, including his term of service in the Army Reserve, but any such enlisted man may be reenlisted for a further term of seven years under the same conditions in the Army at large, or, in the discretion of the Secretary of War, for a term of three years in the Army Reserve; and any person who may have been discharged honorably from the Regular Army with character reported as at least good, and who has been found physically qualified for the duties of a soldier, if not over forty-five years of age, may be enlisted in the Army Reserve for a similar term of three years:"

(7) "That in the event of actual or threatened hostilities the President, when so authorized by Congress, may summon all furloughed soldiers who belong to the Army Reserve to rejoin their respective organizations, and during the continuance of their service with such organizations they shall receive the pay and allowances authorized by law for soldiers serving therein, and any enlisted man who shall have reenlisted in the Army Reserve shall receive during such service the additional pay now provided by law for the soldiers of his arm of the service in their second enlistment period.

Upon reporting for duty, and being found physically fit for service, they shall receive a sum equal to five dollars per month for each month during which they shall have belonged to the Reserve, as well as the actual cost of transportation and subsistence from their homes to the places at which they may be ordered to report for duty under such summons."

Held, (1) That the fourth proviso in section 2 of the act of August 24, 1912, *supra*, is to be regarded as only a partial definition of the "Army Reserve," and that the section as a whole indicates that the Army Reserve includes, along with soldiers furloughed at the end of four years, soldiers furloughed on their own applications at the end of three years, together with men who reenlist or enlist in the Army Reserve as authorized in said section;

(2) That the men who enlist or reenlist in the Army Reserve form a class different from the Army Reserve composed of furloughed soldiers only in respect of the fact that the former do not enter the Reserve by way of furlough from particular organizations, and that the provision for their pay when summoned for active duty is somewhat different from that of soldiers furloughed to the Army Reserve, but that all members of the Reserve are under the same obligation to report for service when summoned by the President, in the event of actual or threatened hostilities, when so authorized by Congress.

(34-050, J. A. G., Oct. 1, 1912.)

ARMY RESERVE: Right to vote; amenability to trial by courts-martial.

With reference to the following questions, viz:

"(1) Do members of the Army Reserve who return to their legal residences have a right to vote in those States that by their constitution deny this right to members of the U. S. Army or Navy?"

"(2) Are members of the Army Reserve amenable to trial by court-martial for any military offenses committed by them while in Reserve and not recalled to the colors?"

Held, that as soldiers furloughed to, or enlisted or reenlisted in, the Army Reserve established by section 2 of the act of August 24, 1912 (37 Stat., 590), belong to and constitute part of the Army of the United States, even though they have not been summoned for active service, the first question should be answered in the negative and the second in the affirmative.

(86-220, J. A. G., Nov. 26, 1912.)

CLERKS AND EMPLOYEES: Civil service; removal of a person in the classified service on written charges.

Charges of turning in defective work and violating the rules were made against a seamstress at a quartermaster depot, to which she made reply. The Chief of the Quartermaster Corps having decided that the evidence was not sufficient to warrant a discharge, the papers were again submitted with additional affidavits supporting the charges and findings of the depot council that her discharge should be recommended. Section 6 of the act of August 24, 1912 (37 Stat.,

555), appropriating for the Post Office Department, provides that no person in the classified civil service shall be removed therefrom except for reasons stated in writing, and that a copy of the charges preferred shall be furnished to the person sought to be removed who shall—

“also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof;”

Held, that the statute gives to the employee the right to answer not only the charges but also the affidavits in support thereof, and as the new evidence in this case does not seem to have been brought to the attention of the accused employee the record does not show compliance with the statute. The accused should be given opportunity to answer or explain the allegations in the affidavits.

(16-210, J. A. G., Nov. 20, 1912.)

CLERKS AND EMPLOYEES: Pay of on legal holidays when not rendering service; closing public offices on general holidays.

Upon consideration of the question of closing the offices of the War Department in and about the port of New York on the day of the general election in 1912. *Held*, that there is no legal objection to the War Department's following the usual practice of closing its offices or reducing the number of employees on duty to the minimum necessary for the transaction of public business, on election days or other general holidays. If this be done, no question could arise as to the pay of employees whose compensation is fixed by the month or year, but no compensation could be paid to per diem employees who render no service on such days, unless specifically authorized by Congress.

(2-153.11, J. A. G., Oct. 28, 1912.)

CLERKS AND EMPLOYEES: Payment of living expenses while on temporary duty.

An electrical assistant of the Signal Corps, stationed at the headquarters of the Central Division, was engaged on temporary duty at Fort Sill, Okla., for more than 20 days. Before completing his work at that post he was ordered to perform other temporary duty at another place, and was compelled afterwards to return to Fort Sill to complete the work under his first assignment. Subdivision 5, paragraph 744, Army Regulations, 1910, provides that civilian employees of the War Department are entitled to reimbursement for the cost of meals and lodging during absence from their regular stations on temporary duty. This right has been limited by a letter of The Adjutant General of the Army to a period of not to exceed 30 days.

Held, that as the electrical assistant in this case was interrupted by competent orders in the performance of his temporary duty at Fort Sill, his return to complete the work at that post was in the nature of a second assignment or tour of duty, and that he was entitled to an allowance of 30 days for each assignment at said post.

(16-403, J. A. G., Nov. 4, 1912.)

CLERKS AND EMPLOYEES: Transfer and payment of from lump-sum appropriation.

It was proposed to transfer a clerk at \$1,200 from the office of the Chief of Engineers, War Department, to the Engineer Department at Large and pay him a salary of \$1,500 from lump-sum appropriations, the clerk to be stationed at Washington, D. C., and his duties to be essentially different from those he was already performing. Section 7 of the general deficiency act of August 26, 1912 (37 Stat., 626), provides, *inter alia*:

"Nor shall any person employed at a specific salary be hereafter transferred and hereafter paid from a lump-sum appropriation, a rate of compensation greater than such specific salary."

Held, that the proposed transfer and appointment would, in effect, be a transfer at the salary now received and an advance in compensation in violation of said act, and that the same could not lawfully be made. 19 Comp. Dec., 163.

(5-075, J. A. G., Nov. 9, 1912.)

CLOTHING ALLOWANCE: Change of initial allowance during enlistment.

A soldier enlisted May 12, 1912, for three years and was credited with the initial allowance for clothing in force at the time. In estimating this initial allowance the value of an overcoat was taken into consideration. On July 1, 1912, the issue of overcoats as a part of a soldier's clothing allowance was discontinued, and such articles were thereafter issued on company and detachment commanders' receipts for the use of the soldiers. The initial allowance was at the same time reduced. This soldier did not draw an overcoat and one was issued for his use. Paragraph 1176, Army Regulations, 1910, provides that the initial allowance for clothing is not considered as earned until the soldier has been in service for six months.

Held, that this soldier should be credited on his initial clothing allowance at the rate in force at the time of his enlistment, and that such credit should remain notwithstanding the initial allowance was subsequently reduced before the expiration of the six months' period. C. 27637.

(72-420, J. A. G., Nov. 25, 1912.)

CLOTHING ALLOWANCE: Title to clothing issued to soldier while in the service and that retained by him after discharge.

The law provides that the President shall prescribe the quantity and kind of clothing which shall annually be issued to the troops of the United States (sec. 1296, Rev. Stat.) and this is done by the issue of tables from time to time showing the articles which shall be issued and the values thereof. When the soldier is discharged from the service his clothing account is adjusted pursuant to sections 1302 and 1308, Revised Statutes, and he is charged in cash with the value of the clothing overdrawn and paid in cash the difference in value between the amount allowed and the amount drawn.

Held, that while in the service the clothing drawn by the soldier still remains the property of the United States, but that, upon the final settlement on discharge when the soldier pays for the clothing which he is allowed to retain, the Government relinquishes its title to such retained clothing and the same becomes the property of the soldier.

(C. 11251, J. A. G., Jan. 10, 1912.)

COMMUTATION OF QUARTERS: Duty with troops; status of an officer acting as post and district quartermaster, and of a pay clerk on duty with him.

An officer of the Quartermaster Corps was ordered to report to the commanding officer at Fort Banks, Mass., for duty as post quartermaster, and also to the commanding officer of the Artillery District of Boston, whose headquarters were at the same place, for duty as district quartermaster. A pay clerk was also ordered to report at the same time at Fort Banks to said officer of the Quartermaster Corps for duty with him. Owing to lack of available quarters at Fort Banks authority was requested for the officer and pay clerk to live at Winthrop, Mass., and draw commutation of quarters. *Held*, that as an officer of the Quartermaster Corps the duties of such officer under his assignment were not limited to those of quartermaster but embraced duties formerly covered by the Quartermaster, Subsistence, and Pay Departments; that his duties as post and as district quartermaster placed him in the status of an officer serving with troops; and that he was, therefore, not entitled to commutation of quarters. For the same reason the pay clerk should be regarded as serving with troops and as not entitled to said commutation.

(72-333, J. A. G., Dec. 7, 1912.)

CONTRACTS: Appropriations; obligations in excess of; liability for indefinite amount.

Section 3679, Revised Statutes, as amended by the act of February 27, 1906 (34 Stat., 48), expressly forbids the expenditure of money in excess of appropriations, or the involving of the Government "in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law."

Held, that the stipulation in a proposed revocable lease of a portion of a pier from the Commissioner of Docks, New York City, to indemnify the city for all claims arising from accidents to persons or property, is objectionable because it would bind the Government to a contingent liability for an indefinite and possibly a large amount, incapable of ascertainment when the obligation is entered into, and which might exceed the amount of the appropriation. *Held further*, that a provision in said lease for rebuilding the premises if destroyed by fire or other means named, is likewise objectionable as indefinite, and should not be inserted unless a sufficient sum for rebuilding be reserved from the appropriation.

(76-012.1, J. A. G., Oct. 28, 1912.)

CONTRACTS: Eight-hour law and law requiring bonds for the protection of laborers, mechanics, and material men; labor on vessels of the United States.

The act of August 1, 1892 (27 Stat., 340), limits the service or employment of any laborer or mechanic employed "by any contractor or subcontractor upon any of the public works of the United States" to eight hours in any one calendar day, and provides that—

"It shall be unlawful for * * * any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency."

The act of February 24, 1905 (33 Stat., 812), requires a bond for the protection of laborers and material men to be executed by every contractor—

"For the construction of any public building, or the prosecution and completion of any public work."

Held, that vessels owned by the United States and those under construction for it, the title to which passes to the United States as payments are made, are public works within the meaning of the above statutes relating to the hours of labor and the execution of bonds for the protection of laborers and material men (*Title Guarantee & Trust Co. v. Crane Co.*, 219 U. S., 24; 29 Op. Atty. Gen., 395), and that the specifications in future contracts for the construction or repair of such vessels should contain a reference to said act of August 1, 1892, the same as contracts on other public works involving the employment of laborers and mechanics.

(32-213.3, J. A. G., Oct. 21, 1912.)

CONTRACTS: Laborers and material men; bond for protection of, where consideration is small.

The act of February 24, 1905 (33 Stat., 811), requires every person entering into a contract with the Government for the construction of any public building or the prosecution and completion of any public work to execute the usual penal bond with an additional provision for making prompt payment to all persons furnishing labor or material for the work. *Held*, that the statute makes no exception in cases where the consideration is small or where the Government is furnishing part of the material, and that the requirement for the execution of a bond in such cases can not be waived; but, *held further*, that the amount of the bond as fixed by paragraph 577, Army Regulations, 1910, and General Orders, No. 60, War Department, May 8, 1911, may be waived and the amount increased or diminished as the circumstances in each case may seem to require.

(12-123.1, J. A. G., Oct. 14, 1912.)

CONTRACTS: Option to increase quantities when appropriation is insufficient for the entire work.

The amount appropriated for a public work not being sufficient for its completion, it was proposed to insert in the specifications a provision reserving to the United States the right to increase the

quantities used as a basis for canvassing the bids to an amount sufficient to complete the entire work should Congress make provision therefor. *Held*, that this would not bind the Government to increase the amount, and the insertion of the provision contemplated would not be a violation of sections 3679, 3732, and 3733, Revised Statutes, which prohibit the entering into a contract beyond the amount appropriated by law for its fulfillment; and that the original advertisement would be sufficient to cover the contract as extended by the option.

(76-101, J. A. G., Nov. 7, 1912.)

COPYRIGHTS: Compilation of daily wage scale by a Government clerk; protection of copyright when used by the United States.

A clerk in the Engineer Department at Large compiled a daily wage scale at his home and offered the same to the department for use in the public service, reserving to himself, if permissible, the privilege of copyrighting the same. *Held*, that the clerk would not lose his right of copyright in his production by granting to the United States permission to print the same for its use (9 Cyc., 915), but that in order to protect himself from infringement it would be necessary to have a notice printed on the title page, or on the page following, reserving the right to the copyright.

(24-330, J. A. G., Dec. 6, 1912.)

DESERTERS: Statutes of limitation; 48th and 103d Articles of War; reward for apprehension.

A soldier enlisted on June 16, 1906; deserted on August 24, 1907; was apprehended and returned to military control on January 28, 1910; escaped from confinement on February 24, 1910, while awaiting trial; and was again apprehended and returned to military control on or about November 20, 1912. He claimed to have been within the limits of the United States during the entire period since his enlistment, and there was nothing in the statement of facts to negative this claim, nor was there anything in the statement of facts to indicate that, so far as the offense of escape was concerned, the case came within the saving clause of the first paragraph of the 103d Article of War, reading as follows: "unless, by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period."

The accused had not been restored to duty to complete his term of service, either following an admission of the first charge of desertion or following a conviction upon that charge.

Held, that in the absence of an admission as to the correctness of the charge of desertion or of a conviction upon that charge, thus determining that the soldier had not completed his term of service and fixing his liability to serve for a definite period after his restoration to duty and beyond the calendar term for which he enlisted, the 48th Article of War, in connection with the mere fact that he had been charged with desertion, can not serve to postpone the beginning of the two-year period of limitation prescribed in respect of deser-

tion in the second paragraph of the 103d Article of War; that should the soldier be arraigned upon the two charges of desertion or upon the charge of escape, he might plead the statute of limitations successfully in respect of said offenses; and that, in view of this fact and of the provisions of paragraph 121, Army Regulations, no reward was payable for his apprehension and delivery.

(26-323, J. A. G., Nov. 23, 1912.)

DETACHED SERVICE: Absence with leave; penalty for detaching officer for duty of any kind under certain conditions.

The Army appropriation act of August 24, 1912 (37 Stat., 571), contains a proviso prohibiting officers of company grade from being detached from their organizations for duty of any kind unless they shall have been "actually present for duty for at least two of the last preceding six years" with their company organizations, adding that—

"All pay and allowances shall be forfeited by any superior for any period during which, by his order or his permission or by reason of his failure or neglect to issue or cause to be issued the proper orders or instructions at the proper time, any officer shall be detached or permitted to remain detached in violation of any of the terms of this proviso."

Held, that an officer of company grade who is absent with leave, though not "actually present for duty" with his organization is not to be considered as detached from his organization "for duty of any kind" in such sense as to bring into operation the penalty clause of the proviso above quoted.

(6-224, J. A. G., Sept. 16, 1912.)

DETACHED SERVICE: Absence; leave of, to company officer on detached service who may no longer remain thereon, to enable him, while on leave status, to continue in the same duties.

A captain of Cavalry who had had less than two years' service with his troop out of the preceding six years, and who was on duty under appropriate orders as a student officer at a military school in France, applied for three months leave of absence in order to continue his work at said school and for permission thereafter to continue said work until the completion of the course, if in the meantime the military authorities could make arrangements to that end. An order had been issued to said officer relieving him from duty at the school on December 15, 1912, and directing him to proceed to join his troop in compliance with the proviso of the act of August 24, 1912 (37 Stat., 571), as amended by the joint resolution of the same date, that—

"On and after December 15, 1912, in time of peace whenever any officer holding a permanent commission in the line of the Army with rank below that of major shall not have been actually present for duty for at least two of the last preceding six years with a troop, battery, or company of that branch of the Army in which he shall hold said commission, such officer shall not be detached nor per-

mitted to remain detached from such troop, battery, or company for duty of any kind."

Held, that service as a student officer at a foreign military school under the conditions stated is service for which an officer of the line of the Army below the grade of major is not to be detached or permitted to remain detached if he shall not have been "actually present for duty for at least two of the last preceding six years" with his troop, battery, or company, and that the granting of a leave of absence for the purpose of allowing an officer to continue in the performance of such duty during the period of such absence would be in contravention of the law. *Advised*, therefore, that the leave be not granted. 19 Op. Atty. Gen., 600.
(6-124, J. A. G., Nov. 27, 1912.)

DETACHED SERVICE: Duty status; definition of the terms "company, troop, or battery," "actually present for duty," and "detached for duty of any kind;" date when penalty clause becomes operative.

The Army appropriation act of August 24, 1912 (37 Stat., 571), provides—

"That hereafter in time of peace whenever any officer holding a permanent commission in the line of the Army with rank below that of major shall not have been actually present for duty for at least two of the last preceding six years with a troop, battery, or company, of that branch of the Army in which he shall hold said commission, such officer shall not be detached nor permitted to remain detached from such troop, battery, or company, for duty of any kind; and all pay and allowances shall be forfeited by any superior for any period during which, by his order, or his permission, or by reason of his failure or neglect to issue or cause to be issued the proper order or instructions at the proper time, any officer shall be detached or permitted to remain detached in violation of any of the terms of this proviso;"

This proviso was amended by joint resolution of the same date (37 Stat., 645), substituting for the word "hereafter" where the same first appears therein, the words "on and after December fifteenth, nineteen hundred and twelve."

On consideration of said proviso, as amended, it was *held*:

1. Congress has specifically designated the composition of troops, batteries, and companies, and prescribed the number and grades of officers and enlisted men for each. It has thus pronounced a fairly specific definition of what a troop, battery, or company is, and has limited the number of them that normally compose the several branches of the service. The presumption is strong that Congress has employed these terms in the above proviso in the sense thus defined. The term troop, battery, or company can not cover machine-gun platoons, regimental detachments (such as rifle teams), Army service detachments maintained at the service schools and at the Military Academy, the Cavalry, Field Artillery, and Engineer detachments maintained at the latter point, and the recruit and prison companies maintained at the recruit depots and the United States Military Prison and its branch.

2. The use of the word "actually" in connection with the phrase "present for duty" requires that the phrase should be construed literally, that is, that the officer should be present on duty with one of the organizations prescribed in the sense that he is *in a regular and normal duty status* with respect thereto, although it may at times be impracticable for him actually to perform every duty normally pertaining to the status—and therefore as excluding an officer who, although physically present at the post or station where his troop, battery, or company is serving, and is separated from duty therewith by an order assigning him for other duty, notwithstanding he may be available for such duty in the sense that an order from his immediate commander would restore him to such duty.

(a) Performance of duty is the object of the presence which the statute commands and is the single contemplation of the phrase "actually present for duty;" and any presence that does not contemplate as its primary purpose and result the performance of duty as the duty shall normally occur is a constructive rather than an actual presence for duty and is not a compliance with the statute.

(b) In determining when officers who have been withdrawn from the performance of normal duty with a troop, battery, or company, including those so withdrawn by the orders of their immediate regimental or post commanders, may be treated as again "actually present for duty" with a troop, battery, or company, the true rule is that when such an officer shall resume, pursuant to competent orders, such an actual relation to a company as will make him available without further orders to perform the usual duties of his grade with respect to said company, with the primary purpose of performing them, and therefore stands able and ready to perform them as they arise in the course of military administration, he is "actually present for duty" with a troop, battery, or company within the meaning of the statute.

3. In the phrase "shall not be detached nor permitted to remain detached * * * for duty of any kind," the qualifying words "of any kind" bring within the purview of the phrase all descriptions of duty for which it is customary to detach officers, irrespective of its character or duration, and it would not be competent to read into the proviso an exception as to any detached duty which under the customs of the service or the usual practice of military administration would not require a formal order of detachment from a troop, battery, or company. The kind of order which creates or destroys the duty status or the grade of authority which issues such order can not be regarded as material in determining whether any kind of "detachment" comes within the terms of the proviso. The fact that a formal order is not required, or is not issued, or does not denominate such duty as detached duty, or does not in terms order a detachment of any kind, can not conclude the facts in the case or serve to qualify the force of the words "duty of any kind;" nor can the duration of the duty, whether transitory or temporary, or for the longer and usually more or less definite period, serve to extinguish its character as "duty of any kind."

4. *Held*, consequently, in response to a specific inquiry—

(a) That an officer is not to be considered as "actually present for duty" with a troop, battery, or company when ordered to and performing the following descriptions of duty, provided that the

order assigning him to such duty operates to relieve him from the performance of duty with his proper organization, namely:

To another post to take an examination for promotion; to the Philippine Islands even though the officer is due to be transferred on account of foreign service; on court-martial duty at another post as a member, witness, judge advocate, or counsel; to make annual militia inspections; for militia duty at camps of instruction; for duty as umpire or observer at maneuvers, or as range officer or competitor at competitions; for reconnoissance or map work; to supervise elections; as a member of any board or commission at a post other than his own; to conduct prisoners; for duty as regimental or battalion staff officer; for duty as post adjutant, quartermaster, commissary, range officer, prison officer, post exchange officer, engineer, ordnance, signal, or police officer; for duty with a machine-gun platoon or regimental detachment; on duty relieving flood and earthquake sufferers; sick in quarters or in hospital at his post or elsewhere; in quarantine at a station where his company is on duty; on duty as artillery district staff officer serving at a post where Coast Artillery companies are stationed, but performing no company duty; except, however, that an officer who commands a detached portion of his troop, battery, or company is to be considered as actually present for duty with his organization as contemplated by said proviso.

(b) That an officer of company grade who is sick in quarters or in hospital at his post or elsewhere, or in quarantine at a station where his company is on duty or elsewhere, or in compliance with summons from a civil or military court, or in arrest, or undergoing trial, or traveling in compliance with orders to change station from one company assignment to another, or absent with leave, though not "actually present for duty" with his organization, is not to be considered as detached from his organization "for duty of any kind" in such sense as to bring into operation the penalty clause of the proviso.

(c) The status "awaiting orders" is an exceptional one in our service and the attendant circumstances in each case must be relied upon to determine whether the placing of the particular officer in that status may or may not bring into operation the penalty clause of the proviso.

5. *Advised*, that the effect of the proviso is to require that an accounting be kept with all line officers of company grade under the headings "actually present for duty with a troop, battery, or company," and "detached from a troop, battery, or company for duty of any kind." The first account will reveal the officer's eligibility for detached service; the second will reveal the field of application of the penalty clause of the statute. The accounting will also reveal a third status of officers of company grade in which they are neither "actually present for duty with a troop, battery, or company," nor detached therefrom for duty of any kind. Such absences from duty with a company will prevent the officers from accumulating eligibility for detached service, but will not furnish any occasion for the application of the penalty clause.

6. That the period between the approval of the above proviso (August 24, 1912) and the date of its taking effect (December 15, 1912) is one of preparation for meeting the requirements of the

statute; that the changes in the status and stations of officers necessary to meet the requirements of the proviso must be ordered so as to become effective on or before December 15, 1912; and that on and after that date the penalty clause of the proviso will be operative against any officer responsible for its nonenforcement.

(6-124, J. A. G., Sept. 16, 1912.)

DETACHED SERVICE: Duty status; detail as professor of military science and tactics, and assumption of active duty while on leave of absence.

Section 1225, Revised Statutes, provides that—

“The President may, upon the application of any established college or university within the United States, having capacity to educate, at the same time, not less than one hundred and fifty male students, detail an officer of the Army to act as president, superintendent, or professor thereof: * * *.”

Said section was amended by the act of November 3, 1893 (28 Stat., 7), which provided that—

“No officer shall be thus detailed who has not had five years’ service in the Army and no detail to such duty shall extend for more than four years.”

An officer who had not had sufficient commissioned service to render him available for detail as professor of military science and tactics under the provisions of said section, as amended, applied for leave with permission to report to the president of the university to which he sought to be detailed as soon as the position should become vacant, and with the purpose of performing the duties thereof while on leave, and of entering upon the duties of the position under a regular detail thereto, after the expiration of his leave when he would have had sufficient commissioned service to permit his detail. *Held*, that when an officer on leave enters upon the actual performance of military duties, with the permission of the War Department, he thereby relinquishes his leave and enters upon a duty status, and that to permit a leave to be taken for this purpose would be to grant permission to do by indirection what could not lawfully be done directly. *Advised*, therefore, that the leave requested for the purpose expressed, and the permission requested in connection therewith, be not granted.

(2-100, J. A. G., Nov. 25, 1912.)

DETACHED SERVICE: Duty status; mine planter; status of an officer commanding same with respect to his being actually present for duty with his company.

A mine planter exists for the purpose of giving expert instruction in mine service. The command consists of a commanding officer assigned thereto by the War Department, a detachment of men chosen from one or more companies for their aptitude and efficiency in the duties required of them, a crew of civilian employees, the vessel, and the matériel. The duty of such command is to render expert or special instruction in mine service to the various Coast Artillery commands which it may visit in the several Artillery districts as required by orders. The command of a mine planter serv-

ing several districts under the direction of the War Department is not subject to the orders of the commander of the district to which it is for the time being assigned for instruction purposes, except as to the matters pertaining to the employment of the vessel. An officer assigned to the command of a mine planter by the War Department is habitually carried as on detached service and remains on such duty the usual time permitted for detached service. The regulations for mine planters declare that "the mine planter and the detachment on board shall constitute a separate command immediately under the command of the officer of the vessel." *Held*, that since, under the present regulations and the conditions of the service where a single planter serves several districts, the commanding officer of a mine planter is, except for minor purposes, under the immediate jurisdiction of the Secretary of War, exercises a separate and independent command under such authority, and is not under the control of any company or post commander, he is not, therefore, to be considered as "actually present for duty" with his company within the meaning of the detached-service law, even though he is in command of a detachment of the company to which he belongs or from which he was detached for duty on the mine planter.

(6-124, J. A. G., Dec. 12, 1912.)

DETACHED SERVICE: Ordnance Department; service in.

The Army appropriation act of August 24, 1912 (37 Stat., 571), as amended by the joint resolution of the same date, carries a proviso reading in part as follows:

"On and after December 15, 1912, in time of peace whenever any officer holding a permanent commission in the line of the Army with rank below that of major shall not have been actually present for duty for at least two of the last preceding six years with a troop, battery, or company of that branch of the Army in which he shall hold said commission, such officer shall not be detached nor permitted to remain detached from such troop, battery, or company, for duty of any kind; * * * nor shall anything in this proviso be held to apply to the detachment or detail of officers for duty in the * * * Ordnance Department * * *"

Held, that a captain or lieutenant of the line who serves under detail in the Ordnance Department thereby accumulates ineligibility for detached service in general; that in determining the officer's eligibility to remain on duty as a student officer at the Coast Artillery School and therefore away from his company, after December 15, 1912, the period of his service in the Ordnance Department within the last preceding six years must be taken into account; and that such service may not be treated as service with a company of the branch in which he is commissioned.

(6-010, J. A. G., Oct. 14, 1912.)

DISCHARGE: For disability when soldier is under charge of desertion.

A soldier was enrolled and mustered into the service February 27, 1864; deserted March 27, 1864. He was arrested the same day, confined in prison, and afterwards sent to hospital, all the while being

held as a deserter. He was discharged December 5, 1864, on surgeon's certificate of disability on account of bronchitis, incurred after enlistment. His pay accounts were suspended on account of desertion and there was nothing to show that he was relieved of the charge or had been placed upon military duty thereafter. *Held*, that there are three kinds of discharge known to the military service: Honorable discharge for honest and faithful service, dishonorable discharge in pursuance of the sentence of a court-martial, and discharge without honor occupying a middle ground between the other two and given where, for certain reasons due to the soldier's fault, he can not be honorably discharged; and that while the soldier was held under a charge of desertion, without restoration to duty, he was in a status of dishonor and could not be honorably discharged. His discharge was, therefore, one without honor.

(28-214, J. A. G., Dec. 21, 1912.)

EIGHT-HOUR LAW: Contracts for the construction of wagons for the Army according to specifications unfitting them for use by the general public.

On consideration of the question as to whether or not the act of June 19, 1912 (37 Stat., 137), relative to the application of the eight-hour law for laborers and mechanics engaged on Government contracts, applied to contracts for the construction of chess wagons, tool wagons, and pontoon wagons which by reason of their manufacture according to Government specifications are unsuitable for general use by the public and are not therefore ordinarily to be purchased in open market. *Held*, that while wagons manufactured for the Government for the purposes indicated can not be purchased in open market such vehicles come within the exception in the law which permits contracts to be made without conforming to its requirements "for such materials or articles as may usually be bought in open market * * * whether made to conform to particular specifications or not," and that specifications which make articles unsuitable for general use or for other than military use do not bring them within the operation of the law.

(32-313, J. A. G., Dec. 10, 1912.)

ENLISTED MEN: Reduction in rank of a noncommissioned officer on charge of desertion.

A quartermaster sergeant absented himself without leave, was reported as a deserter, and was dropped from the rolls as such. He subsequently surrendered himself to the military authorities, and the charge of desertion against him was set aside, under orders from division headquarters, as having been erroneously made. Following his return to duty he was officially recognized as a sergeant and performed the duties of that grade from the date of his return. Paragraph 277, Army Regulations, 1910, provides, *inter alia*, that "The desertion of a noncommissioned officer vacates his position from the date of his unauthorized absence."

Held, that the order setting aside the charge of desertion as having been erroneously made was an authoritative determination that the

soldier was not a deserter; and that paragraph 277, Army Regulations, has, therefore, no application to this case. *Held further*, that as no action appears to have been taken by competent authority to reduce the soldier to the ranks, and as his warrant as sergeant was not vacated as the result of his unauthorized absence, any pay to which he may have become entitled since his return to duty should be computed upon the basis of the pay of the grade of sergeant.

(26-520, J. A. G., Dec. 17, 1912.)

NOTE.—This case is to be distinguished from that digested in Dig. Ops., J. A. G., 1912, p. 413, 1, since it did not appear in that case that the designation of the soldier as a deserter was an error.

ENLISTMENT: Making good time lost while absent without leave; computing service after expiration of enlistment.

A soldier was absent without leave for various periods exceeding one day and spent a considerable time in confinement as punishment for such unauthorized absences, all during the period of his enlistment. After the expiration of his term of enlistment and while making good time lost, he absented himself without leave on various occasions and was in confinement for various periods awaiting trial and serving sentences on account thereof. The act of May 11, 1908 (35 Stat., 109), provides that—

“An enlistment shall not be regarded as complete until the soldier shall have made good any time lost during an enlistment period by unauthorized absences exceeding one day.”

Held, that the soldier should make good the time lost by his unauthorized absences exceeding one day during his enlistment period, but is not required to make good time spent in confinement awaiting trial or undergoing punishment therefor. *Held further*, that in making good time lost during his enlistment by such unauthorized absences the soldier is not entitled to count time absent without leave after his enlistment has expired or time spent in confinement on account of such absence.

(34-052, J. A. G., Oct. 14, 1912.)

ENROLLMENT: Date of, for United States service, of a soldier of Company D, Eighth Pennsylvania Reserves, Civil War.

A soldier of Company D, Eighth Pennsylvania Reserves, was shown by the muster-in roll to have been mustered into the United States service with his company at Washington, D. C., July 29, 1861, said roll also showing that all members of the company with a few exceptions were enrolled May 1, 1861, at Brownsville, Pa. The first bimonthly muster roll thereafter, dated August 31, 1861, showed all members of the company to have been enrolled June 15, 1861, at Pittsburgh, Pa., and all subsequent muster rolls to June 30, 1862, gave the same date to the soldier's enrollment. All muster rolls after June 30, 1862, gave the date of the soldier's enrollment as May 1, 1861. He was paid by the United States from July 21, 1861, inclusive. The State was afterwards reimbursed by the United States for the payment of the soldier from May 1 to July 20, 1861.

On April 15, 1861, the President called forth, for three months, 75,000 of the militia of the several States. May 1, 1861, may be presumed to be the date when Pennsylvania's quota reported at the rendezvous. It appears that the number so reporting exceeded the quota, that the governor retained the excess and organized them into additional companies, and that this soldier "joined" one of such companies on that date. On May 15, 1861, the State provided by law for the organization of a reserve corps composed of these additional companies, the members of which were required to be enlisted in the service of the State for a period not to exceed three years or during the war, unless sooner discharged, and were liable to be called into the service of the United States. The soldier with others of his company went into camp of instruction at Camp Wright, Pa., on June 15, 1861, and was sworn and mustered into the service of the State June 21 following. The corps as organized was tendered to the General Government but was refused for the reason, among others, that the governor insisted upon the acceptance of the whole corps with its major general and staff officers. Finally, in response to a request from the Secretary of War dated July 13, 1861, the company on July 21, 1861, left the camp to which it had been ordered by the State authorities and proceeded to Washington, D. C., where it arrived on July 23, and was mustered into the United States service as stated. Under these conditions it is *held*—

1. That where the rolls of a company are conflicting as to date of a soldier's enrollment, the circumstances attending the enrollment of the organization to which he belonged, including the date when he was taken up by the United States for payment, will be taken into consideration in determining the true date of enrollment.

2. Where, during the Civil War, forces were raised by the State for its own purposes and for the additional purpose of meeting calls from the Federal Government should they be made, such forces, if subsequently called for and accepted by the United States, should be regarded as having been enrolled for the United States service from the date when they proceeded to comply with the call.

3. That the soldier in this case should be regarded as enrolled for the United States service from July 21, 1861, inclusive, when his company proceeded to comply with the call of the Secretary of War of July 13, 1861, from which date inclusive the soldier was paid by the United States.

(98-111, J. A. G., Nov. 12, 1912.)

FORAGE ALLOWANCE: For extra horse for officer while attending riding school abroad.

A second lieutenant who had been detailed to take a course of instruction for one year at the Imperial Riding School in Germany, requested to be allowed to draw forage and other allowances for three mounts, he having been required to express his intention of providing himself with three serviceable mounts prior to his being ordered to said station. *Held*, that under existing law forage can not be allowed for more than two mounts in this case, being the number for which forage can be issued as prescribed by section 8 of the act of June 18, 1878 (20 Stat., 150).

(72-351, J. A. G., Nov. 16, 1912.)

HEAT AND LIGHT ALLOWANCE: Furnishing same to families of Army officers temporarily absent from their station or serving abroad.

The authority for furnishing heat and light to officers of the Army is found in the act of March 2, 1907 (34 Stat., 1167), as follows:

"Hereafter the heat and light actually necessary for the authorized allowance of quarters for officers and enlisted men shall be furnished at the expense of the United States under such regulations as the Secretary of War may prescribe."

The act of February 27, 1893 (27 Stat., 480), provides:

"Hereafter officers temporarily absent on duty in the field shall not lose their right to quarters or commutation thereof at their permanent station while so temporarily absent."

The Army Regulations provide for fuel allowances to be issued for heating the authorized quarters of officers, and also for allowances of gas and of electricity for lighting the same.

Paragraphs 1053 and 1073, Army Regulations, provide for the issue of said allowances to families of officers "who are temporarily absent, or who are on duty abroad or in Alaska."

An officer ordered to duty in the Hawaiian Islands, as his regular station, desired to have his heat and light allowances issued to his family residing in Washington, D. C. The question was also presented as to whether the fuel allowance could be issued to families of officers serving with troops at Camp Fort Bliss, Tex., away from the stations where they had theretofore been serving. *Held*, that under the law and regulations an officer absent from his station on temporary duty or serving abroad or in Alaska, may have his heat and light allowances issued to his family residing in the United States proper upon his certificate that such allowances will not be otherwise drawn by him, and upon a showing that the quarters actually occupied by him are not heated and lighted at Government expense; and that an officer serving in Hawaii is serving abroad within the meaning of the regulations and may have such allowances issued to his family in the United States under the conditions above stated. *Held further*, that if officers serving at Camp Fort Bliss, Tex., are only temporarily separated from their permanent stations, their heat and light allowances may be supplied to their families either at their permanent stations or elsewhere upon the certificates and showing above stated, but that if their permanent station is at the place where they are serving, such allowances can not be supplied to their families separately, as the regulations make no provision therefor.

(92-310, J. A. G., Dec. 26 and 27, 1912.)

INDIAN COUNTRY: Introduction of intoxicating liquors into; shipment of wine for sacramental purposes.

The act making appropriation for the expenses of the Bureau of Indian Affairs, approved August 24, 1912 (37 Stat., 519), provides:

"Hereafter it shall not be unlawful to introduce and use wines solely for sacramental purposes, under church authority, at any place within the Indian country or any Indian reservation."

On application by a minister of a church at Muskogee, Okla., for a permit for the shipment of wine for sacramental purposes. *Held*, that this act does not require that a person introducing wine into the Indian Country for sacramental purposes shall obtain a permit from the War Department, nor does it authorize said department to issue such a permit; and the War Department under the circumstances must decline to issue the same.

(48-223, J. A. G., Nov. 4, 1912.)

INDIAN COUNTRY: Introduction of intoxicating liquors into for purposes of sale.

On application for a permit to introduce liquor for sale for medicinal purposes into Melletto County, S. Dak., formerly a portion of the Rosebud Indian Reservation in which the same laws relative to the introduction of intoxicating liquors into Indian Country prevails for a period of 25 years from May 30, 1910, date of the act providing for the disposal of portions of said reservation. *Held*, that the authority to grant permits for the introduction of liquor into Indian Country given by section 2139, Revised Statutes, as amended, does not extend to the granting of such permits for the introduction of said liquors for purposes of sale.

(48-221, J. A. G., Nov. 5, 1912.)

INSIGNIA OF MERIT: Congressional medals of honor; evidence required of alleged distinguished service.

A man who had been a corporal in the Army during the Civil War recently applied for a medal of honor under the provisions of section 6 of the act of March 3, 1863 (12 Stat., 751), for distinguished service in action, and in support of his application offered his own unsworn statement containing an account of alleged distinguished service upon two different occasions during the Civil War, and a paper writing purporting to show that the truth of said statement had been sworn to by three former soldiers. *Held*, following a prior well-considered opinion of this office, that the only evidence of distinguished service that may now be made the basis of an award of a medal of honor under said section 6 are the official records of the War Department, and that as the official records in this case contained only the statement that the applicant, on the occasion of the assault upon the enemy's works in front of Petersburg on July 30, 1864, "here captured Colonel Brown commanding a brigade of the enemy," which act of itself did not constitute such distinguished service as to entitle him to a medal of honor, the award should not be made.

(46-111, J. A. G., Dec. 19, 1912.)

LAND: Subjacent support where land is burdened by structures.

It was reported that the private owner of property adjacent to the First Avenue Gate of the Presidio, San Francisco, had given notice that he was excavating for a residence and that he had advised the

commanding officer to take steps to secure the reservation wall, which was thereby in danger of falling. *Held*, that under the law in force in the State of California with reference to subjacent support from adjoining land, which is substantially the same as the common law and the law in force at the time the Government became possessed of said reservation, the duty of the land owner to furnish lateral support to adjoining land does not extend to the additional support required by reason of structures placed thereon, and that the additional work required to support the soil burdened by the wall of the Presidio should be provided at the expense of the Government if it is desired to secure the premises against damage from such excavation.

(80-260, J. A. G., Dec. 20, 1912.)

LINE OF DUTY: Assuming command while absent without leave.

A sergeant, in company with other enlisted men, left his post without leave, secured a launch, and proceeded to a nearby town, where some of the party became involved in a quarrel with civilians. Acting under authority of his rank, he directed the enlisted men to stop fighting and to go aboard the launch, which they did. The sergeant took no part in the quarrel except to endeavor to pacify the parties. After the launch, with the party of enlisted men on board, had proceeded about 25 feet from the dock a shot was fired from the crowd of civilians who had collected on the dock. This shot took effect in the face of the sergeant, resulting later in his death. The 24th Article of War provides that—

"All officers, of what condition soever, have power to part and quell all quarrels, frays, and disorders, whether among persons belonging to his own or to another corps, regiment, troop, battery, or company, and to order officers into arrest, and noncommissioned officers and soldiers into confinement, who take part in the same, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer or noncommissioned officer, or draws a weapon upon him, shall be punished as a court-martial may direct."

Held, that notwithstanding the fact that the sergeant was in the status of absence without leave at the time he received the wound which later caused his death, said Article of War applies in his case, and that as he was properly in the discharge of his duty under said article, at the time he received his injury, he was in the line of duty and his death should not be regarded as the result of his own misconduct.

(42-101, J. A. G., Nov. 30, 1912.)

MILITIA: Radio communication; act of August 13, 1912.

Section 1 of the act of August 13, 1912 (37 Stat., 302), regulating radio communication provides that the license provided for in said act "shall not be required for the transmission or exchange of radio-grams or signals by or on behalf of the Government of the United States."

Section 4 prescribes as a restriction on "private stations" that no such station "shall use a transmitting wave length exceeding two hundred meters, or a transformer input exceeding one kilowatt, except by special authority of the Secretary of Commerce and Labor contained in the license of the station."

The radio sets supplied to the militia by the War Department have a wave length of about 600 meters, and it is desired to install a permanent station for the signal corps of the Ohio State militia with power in excess of one kilowatt. *Held*, having in view the powers vested in Congress over the militia of the States and the legislation of Congress relating to that subject, that radio stations for the instruction of the militia should not be regarded as "private stations," but as stations operated "on behalf of the Government of the United States" within the meaning of the proviso to section 1 of said act.

(58-950, J. A. G., Oct. 12, 1912.)

MOUNTED SERVICE: Supplying mounts to officers below the grade of major while serving abroad on duty requiring mounts.

Two captains of Coast Artillery were serving under assignment with French regiments which required that officers serving therewith should be mounted, and the question arose as to whether mounts might not lawfully be provided for them while under such assignment. It was not deemed advisable by the Government to transport the mounts provided by these officers to the places where they were serving.

By the act of May 11, 1908 (35 Stat., 108), the United States engages to furnish mounts to all officers below the grade of major required to be mounted, but it is provided that if such officers furnish their own mounts they shall receive additional pay. The act of August 24, 1912 (37 Stat., 581), also provides for the purchase of horses "for remounts of officers entitled to public mounts," with the proviso that the number of horses purchased, with the number on hand, "shall be limited to the actual needs of the mounted service."

Held, that under the conditions here stated the Government might lawfully provide mounts for the officers in question if their duties required them to be mounted.

(94-011, J. A. G., Dec. 21, 1912.)

NEGOTIABLE INSTRUMENTS: Payment of stolen check when indorsed in blank and in the hands of an innocent purchaser.

An officer's official pay check was indorsed in blank and delivered to another officer in payment of an account, and without further indorsement was stolen and subsequently discounted by an innocent purchaser. *Held*, that the check so indorsed became available for transfer by anyone into whose hands it might fall, and that an innocent purchaser taking the paper in good faith in the ordinary course of business would obtain a good title thereto, notwithstanding it might have been stolen from the real owner.

(52-011, J. A. G., Oct. 5, 1912.)

PANAMA CANAL: Sending a board of officers or employees of the United States to Guayaquil, Ecuador, to investigate and report upon the sanitary conditions of a foreign port.

It having been suggested that an officer of the Medical Corps of the Army with certain employees of the Isthmian Canal Commission be sent to the port of Guayaquil, Ecuador, and employed in connection with a plan of sanitation of said port, and it further appearing that the Government of Ecuador was prepared to meet the whole or a portion of the expenses connected with such work. *Held*, that there is no legal objection to the action of the Secretary of War in ordering an Army medical officer, or to the action of a chairman of the Isthmian Canal Commission in ordering necessary civilian employees serving under him, to said city for the purpose of examining into the sanitary conditions thereof, and of suggesting a method of sanitation therefor and also of making a report to the United States, all at the expense of the United States; but no officer of the Army nor any civil employee of the United States may, without authority of Congress, accept any pay or emolument from any foreign government, and there is no method whereby a foreign government may pay the United States for the use of its officers or employees, although such an arrangement might be made by treaty.

(64-313, J. A. G., July 8, 1912.)

PATENTED INVENTIONS: Use by the United States of inventions patented by employees of the Government.

An engineer officer of the United States devised and patented a reinforced concrete pile while such officer, but developed his patent at his own expense and at times outside of his regular work under the Engineer Department. The act of Congress approved June 25, 1910 (36 Stat., 851), authorizes suits to be brought against the United States for the infringement of patent rights, with the proviso that the act shall not "apply to any device discovered or invented by an employee of the United States during the time of his employment or service."

Held, that where a person in the employ of the Government not specifically employed for the purpose, at his own expense and outside of his regular working time for the Government, makes and patents an invention, he is entitled to the benefit thereof when used by the Government and may be paid a royalty therefor, although he can not sue the United States for infringement.

(70-340, J. A. G., Oct. 16, 1912.)

PAY CLERKS: Official status of, in the Army; right to purchase ordnance stores.

On application for a decision as to whether Army pay clerks are officers of the Army within the meaning of the statutes and regulations so as to entitle them to purchase ordnance stores for their own use. *Held*, that a pay clerk in the Army occupies a military status and must be deemed an officer of the Army in the sense that he has a military status and is not an enlisted man or cadet, although not a commissioned officer; and as there is nothing in the statutes or regu-

lations providing for the sale of ordnance stores to officers for their own use in the service which would limit the sale to commissioned officers, pay clerks are entitled to purchase ordnance stores for their own use in the military service.

(80-136, J. A. G., Oct. 25, 1912.)

PAY CLERKS: Retirement of, for disability originating prior to act authorizing such retirement.

An examining board found a pay clerk of the Army incapacitated for active service, said incapacity having originated prior to the passage of the act of March 3, 1911 (36 Stat., 1044), giving such clerks the same pay and allowances as Navy paymasters' clerks on shore duty, together with the same right to retirement and retired pay as is allowed such Navy paymasters' clerks. *Held*, that the effect of said act of March 3, 1911, is to recognize the service of Army paymasters' clerks prior to March 3, 1911, as service within the meaning of sections 1453 and 1454, Revised Statutes, and that the retirement of the clerk may be based upon disability incurred while engaged in such prior service.

(6-134, J. A. G., Dec. 27, 1912.)

PUBLIC LANDS: Leases of.

Section 9 of the river and harbor act of March 3, 1909 (35 Stat., 819), gives the Secretary of War authority to grant leases or licenses not exceeding 20 years in duration "for the occupation of such land belonging to the United States on" the Wabash River, Ill., "as may be required for mill sites or other industrial purposes not inconsistent with the requirements of navigation."

Application was made for a lease of a portion of the property of the United States at the lock and dam in the Wabash River at Mt. Carmel, Ill., for the purpose of drilling for oil and gas. *Held*, that the term "other industrial purposes" contained in the above act must be construed in connection with the associated item "mill sites" which it follows, and the authority to lease for such purposes must be restricted to mill sites or other manufacturing purposes having some relation to the utilization of water power, and that the statute does not give authority to lease for the purposes applied for.

(80-723, J. A. G., Oct. 14, 1912.)

PUBLIC PROPERTY: Protection of, in the construction of an emergency levee.

Owing to the subsidence of a levee in front of a military reservation at Jackson, Miss., it became imperative to construct an emergency levee across a portion of the reservation and to utilize a portion thereof as a base for such levee, and also to destroy or remove certain buildings on the reservation. *Held*, that as the property was to be taken for the protection not only of the public but also of Government property, the levee commissioners of the district might lawfully be authorized to construct the proposed work, but that the laying out

of a street through the reservation to replace another one should be submitted to Congress for authorization.

(80-816.7, J. A. G., Nov. 12, 1912.)

QUARTERMASTER CORPS: Appropriations for the three constituent departments; availability for the consolidated corps.

The Army appropriation act of August 24, 1912, made separate appropriations for subsistence under the head of the Subsistence Department and for regular supplies under the head of the Quartermaster's Department in language similar to that employed in making appropriations for the same purposes in previous years. (37 Stat., 578 and 579.) The subsistence Department and the Quartermaster's Department, together with the Pay Department, were by the same act consolidated into the Quartermaster Corps, and it was further provided (p. 594) that—

"The appropriations herein provided for the several departments consolidated in this act shall be available for the consolidated corps herein created."

Upon consideration of the question of the method of expending the appropriations for subsistence and for regular supplies, in view of the consolidation and in view of the provision with reference to the availability of the separate appropriations. *Advised*, that the more specific language used in one appropriation would not operate to exclude the use of the other appropriation, which might provide for the same object in more general terms, but that as the needs of the consolidated corps are now the same as those of the three constituent departments, the appropriations made separately for each department are now available for all. *Advised further*, that where the language of either of the appropriations fairly covers an object, it may be used for that object, regardless of whether such object was formerly under the administration of the department for which the appropriation to be used was originally made or not.

(6-224, J. A. G., Nov. 19, 1912.)

QUARTERMASTER CORPS: Duties therein; availability of line officers for.

Section 3 of the act of August 24, 1912 (37 Stat., 591-593), after providing, *inter alia*, for the consolidation of the office establishments of the Quartermaster General, the Commissary General, and the Paymaster General of the Army into a single bureau of the War Department; for the consolidation of the Quartermaster's, Subsistence, and Pay Departments of the Army into a single corps to be known as the Quartermaster Corps of the Army; and for an ultimate reduction in the number of officers who originally constitute the Quartermaster Corps as a result of the consolidation, continues:

"*Provided further*, that whenever the Secretary of War shall decide that it is necessary and practicable, regimental, battalion, and squadron quartermasters and commissaries shall be required to perform any duties that junior officers of the Quartermaster Corps may properly be required to perform, and regimental and battalion quartermaster and commissary sergeants shall be required to perform any

duties that noncommissioned officers or pay clerks of the Quartermaster Corps may properly be required to perform, but such regimental, battalion, and squadron quartermasters and commissaries shall not be required to receipt for any money or property which does not pertain to their respective regiments, battalions, or squadrons, and they shall not be separated from the organization to which they belong: * * *

Held, that although the clause "whenever the Secretary of War shall decide that it is necessary and practicable, regimental, battalion, and squadron quartermasters and commissaries shall be required to perform any duties that junior officers of the Quartermaster Corps may properly be required to perform," is affirmative in form, its effect is prohibitive as well as affirmative; that, giving the broadest application to the implied prohibition, it would serve to forbid the detail of any officers except those specifically mentioned in the clause to perform duties that officers of the Quartermaster Corps may properly be required to perform, but that, as the affirmative provision relates only to officers belonging to branches of the Army which have a regimental, battalion, or squadron organization, the implied prohibition should be construed as relating only to the same branches; that the legislation under consideration does not affect the availability of any officers for Quartermaster Corps duty except those belonging to the mobile branches of the line of the Army, and, therefore, all officers, except those belonging to the mobile branches of the line, may continue hereafter, as heretofore, to be employed upon Quartermaster Corps duties, including the duties of post quartermasters, when their employment is necessary to supplement the services of the personnel of the Quartermaster Corps; that regimental, battalion, and squadron quartermasters and commissaries may, under the specific terms of this legislation, be required to perform any duties that may properly be required of junior officers of the Quartermaster Corps, including the duties of post quartermasters, provided such officers be not required to receipt for money or property not pertaining to their respective organizations and are not separated therefrom; that officers commissioned in the mobile branches of the line of the Army but detached therefrom under the provisions of law and replaced in their respective branches under the provisions of section 27 of the act of February 2, 1901 (31 Stat., 755), may, as occasion arises, be required to perform Quartermaster Corps duties properly incident to the duties for the performance of which they are detached, but may not be detached for the purpose of assigning to them duties pertaining to the Quartermaster Corps; and that all other officers of the mobile branches of the line of the Army are within the implied prohibition of the new statute and may not be charged with Quartermaster Corps duties.

Held also, that within the meaning of this legislation there is no difference between a memorandum receipt which renders the officer giving it responsible, though not accountable, for the property or funds receipted for and a receipt which renders him accountable as well as responsible; and that regimental, battalion, and squadron quartermasters and commissaries may not be required to give memorandum receipts for money or property not pertaining to their respective organizations.

Held further, that in the sense of this legislation the line of demarcation which separates money or property pertaining to a regiment, battalion, or squadron from other money or property is the line which separates money or property necessary and proper for the use, preparation, and maintenance of the regiment, battalion, or squadron as a mobile unit of the Army from money or property used or intended for other purposes.

(6-224, J. A. G., Dec. 20, 1912.)

QUARTERMASTER CORPS: Enlisted men in; counting time of civilian service of persons enlisting therein to take the place of civilian employees.

Section 4 of the Army appropriation act of August 24, 1912 (37 Stat., 593), provides for the enlistment in the Quartermaster Corps of men to take the place of certain civilian employees and detailed enlisted men rendering service in the Quartermaster's Department of the Army. *Held*, that service as a civilian employee in the Quartermaster's Department prior to enlistment in the Quartermaster Corps under the provisions of said section can not be counted as enlisted service either for the purpose of computing longevity pay after enlistment or for the purpose of retirement.

(6-224.1, J. A. G., Dec. 4, 1912.)

QUARTERMASTER CORPS: Enlisted men; sergeants of the Quartermaster Corps and quartermaster sergeants.

Section 3 of the Army appropriation act of August 24, 1912 (37 Stat., 592), provides that—

"The noncommissioned officers now known as post quartermaster sergeants and post commissary sergeants shall hereafter be known as quartermaster sergeants" who shall "continue to have the same pay, allowances, rights, and privileges" then allowed them by law.

Section 4 of the same act (*idem*, p. 593) provides for the enlistment of not to exceed 6,000 men in the Quartermaster Corps, constituted by said act, including 600 sergeants (first class) and 1,005 sergeants.

Held, that the sergeants whose enlistment is authorized by section 4 of the act are a distinct grade from those formerly known as post quartermaster sergeants and post commissary sergeants, and that no change was made by the law in the status, pay, or allowances of the latter grade, but duties formerly pertaining to post commissary and post quartermaster sergeants may now be performed by any of them under their designation of quartermaster sergeants.

(6-224.1, J. A. G., Nov. 30, 1912.)

QUARTERMASTER CORPS: Officers of; when reduction in the number becomes effective.

Section 3 of the Army appropriation act of August 24, 1912 (37 Stat., 591), consolidates the Quartermaster's, Subsistence, and Pay Departments of the Army into one body to be known as the Quartermaster Corps of the Army, and makes applicable to such corps the

provisions of sections 26 and 27 of the act of February 2, 1901 (31 Stat., 755), regarding details for filling vacancies therein. Said section 3 further provides that no details to fill vacancies occurring in said consolidated corps shall be made until certain prescribed reductions in the number of officers in the corps, in grades from colonel to captain, inclusive, shall have been accomplished, and a proviso is added that it shall be the duty of the Chief of the Quartermaster Corps therein provided for, under the direction of the President and the Secretary of War, "to put into effect the provisions" of said section "not less than sixty days after the passage" of said act.

Held, that the provisions of said section regarding details to the Quartermaster Corps became effective immediately upon the passage of the act, and that thereafter no details to the consolidated corps or to its constituent parts could be made to fill vacancies occurring therein, until the prescribed reduction in the number of officers therein had been accomplished.

(6-011, J. A. G., Oct. 8, 1912.)

QUARTERMASTER CORPS: Promotion; date of vacancies.

Section 3 of the act of August 24, 1912 (37 Stat., 591), reads in part as follows:

" * * * The Quartermaster's, Subsistence, and Pay Departments of the Army are hereby consolidated into and shall hereafter be known as the Quartermaster Corps of the Army. The officers of said departments shall hereafter be known as officers of said corps and by the titles of the rank held by them therein, and, except as hereinafter specifically provided to the contrary, the provisions of sections twenty-six and twenty-seven of the Act of * * * February 2, 1901 * * * are hereby extended so as to apply to the Quartermaster Corps in the manner and to the extent to which they now apply to the Quartermaster's, Subsistence, and Pay Departments, * * *. The officers now holding commissions as officers of the said departments shall hereafter have the same tenure of commission in the Quartermaster Corps, and as officers of said corps shall have rank of the same grades and dates as that now held by them, and, for the purpose of filling vacancies among them, shall constitute one list, on which they shall be arranged according to rank. So long as any officers shall remain on said list any vacancy occurring therein shall be filled, if possible, from among such officers, by selection if the vacancy occurs in a grade above that of colonel, and, if the vacancy occurs in a grade not above that of colonel, by the promotion of an officer who would have been entitled to promotion to that particular vacancy if the consolidation of departments hereby prescribed had never occurred: * * * *Provided further*, that not to exceed six officers holding commissions with the rank of captain in the Quartermaster Corps and who have lost in relative rank through irregularities of promotion and the operation of separate promotion within the three departments hereby consolidated, may, in the discretion of the President and subject to examination for promotion as prescribed by law, be advanced to the grade of major in the Quartermaster Corps, * * *: *And provided further*, that for the purpose

of carrying into effect the provisions of this section the President is hereby authorized to appoint, by and with the advice and consent of the Senate, the Chief of the Quartermaster Corps herein provided for immediately upon the passage of this Act, and it shall be the duty of the said chief, under the direction of the President and the Secretary of War, to put into effect the provisions of this section not less than sixty days after the passage of this Act."

On February 16, 1912, a vacancy occurred in the grade of lieutenant colonel in the Pay Department. On August 27, 1912, the senior major of the former Pay Department was promoted to fill this vacancy, with rank from February 16, 1912. There was no captain holding a permanent commission in the Pay Department. Under the consolidation act a captain theretofore commissioned as a captain in the Subsistence Department became the senior captain in the Quartermaster Corps.

Held, that there being no captain on the permanent list of officers of the former Pay Department, the senior captain permanently belonging to the Quartermaster Corps may at the proper time be promoted to fill the vacancy in question, but that his right to promotion can not be held to antedate the time at which section 3 of the act of August 24, 1912, *supra*, which made the position available for him, becomes administratively effective.

Held further, that the advancement of the six captains for which special provision is made in section 3 of the act of August 24, 1912, must be deferred until the date when the said section is put into administrative effect, and that the rank of said officers as majors in the Quartermaster Corps can not antedate the latter date.

(6-224, J. A. G. Sept. 13 and Oct. 2, 1912.)

QUARTERMASTER CORPS: Quartermaster sergeants; filling vacancies in the grade of.

Section 1142, Revised Statutes, provides for the selection of commissary sergeants from among the sergeants of the line who have served faithfully therein for five years, three of which shall have been in the grade of noncommissioned officer. The act of July 5, 1884 (23 Stat., 109), provides for the appointment of post quartermaster sergeants upon the recommendation of the Quartermaster General, the same to be selected by examination from among the most competent enlisted men of the Army having at least four years' service, and whose character and education shall be such as to fit them to take charge of public property and to act as clerks and assistants to post and other quartermasters. Commissary sergeants were afterwards by law designated as post commissary sergeants and included in the Subsistence Department, and post quartermaster sergeants were by law incorporated into the Quartermaster's Department. Section 3 of the Army appropriation act of August 24, 1912 (37 Stat., 591), consolidates the Quartermaster's, Subsistence, and Pay Departments of the Army into a single corps, to be known as the Quartermaster Corps, and changes the designations of post commissary sergeants and post quartermaster sergeants to quartermaster sergeants. It provides also that the duties now required by law to be performed by officers of said several departments shall hereafter be performed by

such officers of the Quartermaster Corps as the Secretary of War may designate for that purpose. *Held*, that the consolidation of said departments into a single corps and the changing of the designation of said sergeants to that of quartermaster sergeant did not repeal the requirements regarding the appointment of said sergeants, respectively, and that in filling the position of quartermaster sergeant in the consolidated corps the requirements of both of said statutes with respect to the qualifications and methods of selection should be observed, adopting the higher qualifications and observing the more restricted field of selection when the two statutes contain different provisions upon the subject.

(6-224, J. A. G., Oct. 16, 1912.)

TRAVEL ALLOWANCES: To discharged soldiers; commutation of subsistence to place of enlistment; through transportation.

The Army appropriation act of August 24, 1912 (37 Stat., 576), provides "for travel allowance to enlisted men on discharge," adding the proviso that—

"Hereafter when an enlisted man is discharged from the service, except by way of punishment for an offense, he shall be entitled to transportation in kind and subsistence, from the place of his discharge to the place of his enlistment, or to such other place within the continental limits of the United States as he may select, to which the distance is no greater than from the place of discharge to place of enlistment."

Held, that the Government is not limited to furnishing subsistence in kind but may commute the same at the rate of three meals for each 24 hours' travel at a certain rate per meal (Dec. Comp. of the Treas., Oct. 12, 1912). *Held further*, that the Government is bound to furnish transportation in kind to the place to which the discharged soldier is entitled to be transported, if upon some public line of transportation, although it may not be possible to secure through transportation at the place of discharge from such place to the place of destination.

(94-330, J. A. G., Nov. 22, 1912.)

TRAVEL ALLOWANCES: To discharged soldiers; transportation and subsistence to place of enlistment.

The act of August 24, 1912 (37 Stat., 576), provides that an enlisted man discharged, except by way of punishment for an offense, shall be entitled to transportation in kind and subsistence from the place of discharge to the place of his enlistment, or—

"To such other place within the continental limits of the United States as he may select, to which the distance is no greater than from the place of discharge to place of enlistment."

Held, that such transportation and subsistence must be furnished without regard to the cost, but that the Government is not called upon to furnish transportation to points reached only by private conveyances, and the statute is satisfied by furnishing the same to some place upon a line of public transportation nearest to the place selected by the soldier.

(94-332, J. A. G., Oct. 28, 1912.)

VOLUNTEER ARMY: Attendance at Army Service School of officer of the Organized Militia holding certificate of fitness for commission in.

A captain in the Organized Militia of a State held a certificate of fitness for a commission as lieutenant colonel in the Volunteer Army, obtained by examination in pursuance of section 23, act of January 21, 1903 (32 Stat., 779). Said section provides that the President may authorize persons examined and found fitted for the command of troops or the performance of staff duties, and certified as provided in said section, to pursue a regular course of study at any military school or college of the United States, except the Military Academy at West Point. Such person is, while so attending, entitled to the same travel allowances, and quarters or commutation thereof, as officers of the Regular Army under similar conditions. The purpose of said section is to secure a list of persons qualified to hold commissions "in any volunteer force * * * other than a force composed of Organized Militia," and the act further provides that the appointments provided for "shall not be deemed to include appointments to any office * * * of the Organized Militia which volunteers as a body." *Held*, that so long as the applicant retains his status as an officer of the Organized Militia he will not be eligible for appointment as contemplated by said section 23, and therefore does not come within the provisions of said section; and having in view section 16 of the same act, which makes provision for the attendance of officers of the Organized Militia at Army service schools. *Held further*, that if the applicant in this case should be designated to attend such school it must be in his capacity as an officer of the Organized Militia, and that while so attending he would be entitled only to the allowances pertaining to his grade as such officer.

(58-411, J. A. G., Dec. 19, 1912.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

ACCOUNTABILITY: Loss by abrasion of gold coin shipped by a quartermaster for deposit in a United States subtreasury.

A United States Army quartermaster consigned to the United States subtreasury at San Francisco, Cal., for deposit, certain moneys among which was about \$500 in gold coin. The assistant treasurer at San Francisco reported the receipt of the remittance, and stated that the deposit contained light weight gold coin which had depreciated in value to the extent of 20 cents, which sum he had deducted from the nominal value of the total remittance. The limit of tolerance for reduction in weight of gold coin by natural abrasion is fixed by statute, below which the coin will not be received at its nominal face value by the United States Treasury, and can only be received for recoinage at the mint at its bullion value. *Held*, that gold coin being standard money, is not redeemable; that the assistant treasurer could not be required to accept the coin for deposit for a greater sum than he could receive credit for at the mint for recoinage; and that there is no way to reimburse the depositor for the loss in weight, assuming that the same has been correctly stated.

(Comp. of the Treas., Nov. 29, 1912.)

APPROPRIATIONS: For seacoast defenses and for barracks and quarters, Philippine Islands.

A provision in the sundry civil appropriation act of August 24, 1912 (37 Stat., 438), for the fiscal year 1913 reads as follows:

"Military Posts: For continuing the construction of the necessary accommodations for the seacoast artillery in the Philippine Islands, \$250,000."

A provision in the Army appropriation act of August 24, 1912 (37 Stat., 584), for the same fiscal year reads:

"Barracks and Quarters, Philippine Islands: Continuing the work of providing for the proper shelter and protection of officers and enlisted men of the Army of the United States lawfully on duty in the Philippine Islands, * * * \$500,000."

Upon submission of the question as to whether the appropriation contained in the sundry civil act could be used for the construction of barracks and quarters for a regiment of infantry on Corregidor Island. *Held*, that said appropriation is not available for the construction of any buildings except those required for the proper shelter and protection of the seacoast artillery. The words "Military Posts" did not have the effect of enlarging the scope of said appropriation beyond that specifically pointed out in the statute, viz, "the construction of the necessary accommodations for the seacoast artillery in the Philippine Islands."

(Asst. Comp. of the Treas., Nov. 30, 1912.)

CLERKS AND EMPLOYEES: Payment from lump-sum appropriations; transfer and promotion.

Section 7 of the general deficiency act of August 26, 1912 (37 Stat., 626), provides that—

"Nor shall any person employed at a specific salary be hereafter transferred and hereafter paid from a lump-sum appropriation at a rate of compensation greater than such specific salary."

Held, that a clerk or other employee receiving a specific salary who is transferred to a position paid from a lump-sum appropriation can not thereafter be promoted to another position paid from such appropriation and carrying a higher rate of compensation.

(19 Dec. Comp., 163.)

COMMUTATION OF QUARTERS: Providing the same in kind where an officer is assigned to a duty stated to be temporary.

An officer was directed by special orders "To proceed at the proper time to West Point, N. Y., and report in person August 27, 1912, to the Superintendent of the United States Military Academy for temporary duty until December 2, 1912," and then to return to his proper station. Upon reporting as directed and applying for quarters he was informed that "On account of shortage of quarters at this post it will not be practicable to make assignment in the bachelor officers' quarters to an officer ordered here for temporary duty. You will be assigned a room in the Cullom Memorial Hall upon reporting August 27."

Cullom Memorial Hall is the property of the United States. *Held*, that the furnishing of this room was the furnishing of quarters in kind and the equivalent of commutation of quarters, and that this precluded the officer from receiving such commutation at Dallas, Tex., where he had previously been stationed.

(Comp. of the Treas., Oct. 31, 1912.)

HEAT AND LIGHT ALLOWANCE: Furnishing same to families of officers of the Navy during absence of such officers from their permanent stations. Furnishing same in vicinity of station.

The act of March 2, 1907 (34 Stat., 1167), provides—

"That hereafter the heat and light actually necessary for the authorized allowance of quarters for officers and enlisted men (of the Army) shall be furnished at the expense of the United States under such regulations as the Secretary of War may prescribe."

The act of February 27, 1893 (27 Stat., 480), provides that—

"Officers (of the Army) temporarily absent on duty in the field shall not lose their right to quarters or commutation thereof at their permanent station while so temporarily absent."

By law, officers of the Navy are entitled to the same pay and allowances as officers of corresponding rank in the Army.

Paragraph 1052, Army Regulations, 1910, provides for furnishing fuel for the authorized quarters of officers, and paragraph 1053 provides that—

"The Quartermaster's Department may issue or sell fuel in accordance with the preceding paragraph * * * to families of officers who are temporarily absent, or who are on duty abroad or in Alaska, on a written certificate of the officer that the amount of his allowance covered by the certificate will not be otherwise drawn by him. Officers on sick leave, or under sentence of suspension from duty on reduced pay when absent from their proper stations, are not entitled to this privilege. * * *"

Paragraph 1073 of the same regulations provides for furnishing gas and electricity for lighting purposes in accordance with the provisions of said paragraph to families of officers under the same conditions as are prescribed in paragraph 1053 for furnishing them with fuel.

An officer of the Navy stationed at Baltimore, Md., and claiming commutation of quarters at that place, boarded at Washington, D. C., going to and from his place of duty each day. He maintained no quarters in Baltimore. *Held*, that as Baltimore is easily accessible by train from Washington, the latter place might properly be considered as within the vicinity of the officer's regular station, and that payment might lawfully be made for furnishing heat and light to the officer's family at the place of his residence according to the regulation allowance.

Certain other officers of the Navy whose permanent station was at Annapolis, Md., were absent during various periods of time from their regular station on temporary duty or on leave. Heat and light were furnished to the families of these officers or to members thereof at places other than their regular station, according to regulation allowance.

Held, that the law nowhere makes provision for the family of an officer separately and apart from the officer, and that payments for heat and light furnished as the allowance of officers absent on temporary duty or on leave and supplied to their families at places other than their regular stations can not be allowed.

(Asst. Comp. of the Treas., Oct. 28, 1912.)

TAXATION: Duty, under the Philippine tariff, on jute bags used as containers of United States property.

The Quartermaster's Department shipped from the United States to the depot quartermaster in the Philippines a quantity of oats in jute bags for the use of the Army. These oats were grown in the United States, but the bags in which they were contained had been manufactured in the United States from imported raw material and a drawback of the duties assessed thereon had been allowed under the general customs tariff laws of the United States. The Philippine Government claimed that duty should be paid on the bags containing the shipment of oats at the rate of 2 cents each under the Philippine tariff act of August 5, 1909 (36 Stat., 130), which, unlike the preceding act of March 3, 1905 (33 Stat., 974), omits to include in its free list supplies imported by the United States Government for its use. Section 8 of said act of 1909 provides (p. 137)—

"That the rates of duties to be collected on articles, goods, wares, or merchandise * * * going into said islands from the United States or any of its possessions except as otherwise provided in this act, shall be as follows: * * *

"Gunny sacks, each two cents" (*idem*, p. 150.)

Exceptions to the payment of duty are made in said act as follows:

"No duties shall be assessed on account of the usual coverings or holdings of articles, goods, wares, or merchandise dutiable otherwise than *ad valorem*, nor those free of duty, except as in this act expressly provided." (Rule 13 (*h*), sec. 2, *idem*, p. 135.)

"The following articles shall be free of duty upon the importation thereof into the Philippine Islands upon compliance with regulations which shall be prescribed in accord with the provisions of each paragraph. * * *

"351. Coverings and holdings of articles, goods, wares, and merchandise (usual), except as expressly provided." (Sec. 11, *idem*, pp. 172, 173.)

"That all articles, except rice, the growth, product, or manufacture of the United States and its possessions, to which the customs tariff in force in the United States is applied and upon which no drawback of customs duties has been allowed therein, going into the Philippine Islands shall hereafter be admitted therein free of customs duty when the same are shipped directly from the country of origin to the country of destination." (Sec. 12, *idem*, p. 173.)

Held, that the exceptions mentioned in said rule 13 (*h*) in section 2 and in section 11 do not apply to the usual coverings which the act expressly makes dutiable, and therefore do not apply to gunny sacks which are specifically made dutiable; and that as a drawback of the customs duty had been allowed in the United States on the

gunny sacks in question, they do not come within the exception named in section 12 of the act. Jute bags are, therefore, dutiable imports, and the duty, if otherwise properly assessed, should be paid. (Comp. of the Treas., Nov. 8, 1912.)

TRAVEL ALLOWANCE: On discharge; election of enlisted man of Marine Corps to take mileage instead of transportation; travel between Alaska and the United States.

The act of June 12, 1906 (34 Stat., 247), provides that for the purpose of determining allowances for all travel of enlisted men on discharge, travel—

“between the United States and Alaska shall not be regarded as sea travel and shall be paid for at the rates established by law for land travel within the boundaries of the United States.”

The law at that time allowed an enlisted man, on discharge, mileage at the rate of 4 cents a mile from place of discharge to place of enlistment or original muster into the service, except for sea travel. The act of August 24, 1912 (37 Stat., 576), provides that all soldiers on discharge shall receive transportation in kind and subsistence in lieu of the mileage theretofore allowed “or, in lieu of such transportation and subsistence, he shall, if he so elects, receive two cents a mile, except for sea travel, from the place of his discharge to the place of his enlistment.”

By section 1612, Revised Statutes, enlisted men of the Marine Corps are entitled to the same allowances on discharge as enlisted men of the Army.

A quartermaster sergeant in the Marine Corps enlisted in Alaska and was discharged in Boston, Mass. *Held*, that he was entitled, on his election, to mileage at the rate of 2 cents a mile from place of discharge in Boston, Mass., to Sitka, Alaska, where he had enlisted, including such mileage for sea travel between the United States and Alaska.

(Comp. of the Treas., Oct. 31, 1912.)

OPINIONS OF THE ATTORNEY GENERAL.

(Digests prepared in the office of the Judge Advocate General.)

EIGHT-HOUR LAW: Act of June 19, 1912, as applied to laborers employed on dredges.

Section 1 of the act of June 19, 1912 (37 Stat., 137), requires that all Government contracts shall contain a provision that the contractor shall not permit any “laborer or mechanic doing any part of the work contemplated by the contract” to work thereon more than eight hours in any one calendar day, and a penalty is prescribed, to be collected from the contractor for violation of the law. Said section further requires that any officer or person designated as inspector of the work under such contract, or to aid in enforcing the fulfillment thereof, shall forthwith report all violations of the act, with a view to the collection of the penalty.

Upon consideration of the question as to whether persons employed upon a dredge employed in Government work should be considered as "laborers or mechanics" within the meaning of the law, and also as to whether cases where contractors had required or permitted such persons to labor more than eight hours in any one calendar day should be reported in pursuance of the act. *Held*, that by the established rule of the Federal courts all persons regularly employed upon a dredge to assist in its operations as such are seamen and not "laborers or mechanics," and that the nature of their duties makes no difference in the rule. See *Eastern Dredging Co. v. United States*, 206 U. S., 246. 258, *et seq.* *Held further*, that the act of June 19, 1912, should receive the same construction as that given in said decision to the act of August 1, 1892, and that the laborers and mechanics therein mentioned do not include laborers upon dredges, which latter are to be classed as seamen, who do not come within the operation of the law. It will not be necessary, therefore, to report the cases of any persons working upon dredges more than eight hours a day when engaged upon dredging work under a Government contract.

(Atty. Gen., Nov. 27, 1912.)

EIGHT-HOUR LAW: Work contemplated by the contract; contracts for the purchase of projectiles and smokeless powder.

The Secretary of the Navy requested an opinion as to whether section 1 of the act of June 19, 1912 (37 Stat., 137), contemplates that laborers and mechanics shall not be required nor permitted to work more than eight hours a day on work generally, or only said length of time daily upon work contemplated by the Government contract; that is, whether a mechanic, after working eight hours in one calendar day upon work covered by a Government contract, may not, without violating the eight-hour restriction, labor for a further period upon work which the Government contractor may be doing for private parties or for the Government under another contract. An opinion was further desired as to whether the law included work other than that directly contemplated by the contract, such as work in the production and segregation of the materials required, or in the operation of a plant used in the work of the contract; also, whether the law applied to contracts for the purchase of projectiles and smokeless powder, it being stated that there is no sale in this country for such articles except to the Government, that projectiles are delivered to the Government in the shape of finished, treated forgings which are to be fused and loaded to place them in a condition for service, and that the Government manufactures regularly a large proportion of the smokeless powder used by it.

Held, (1) that the eight-hour workday restriction of the act of June 19, 1912, known as the eight-hour law, applies only to work contemplated by the contract—that is, work directly and proximately in view of the contract as specifically appropriated and destined for the Government use; (2) that contracts for the purchase of projectiles are not excepted from the operation of the eight-hour restriction under the term "supplies" or "materials or articles as may usually be bought in open market," which latter are in terms ex-

cepted from the operation of section 1 of said act, but only the work done in assembling the parts, treating the forgings and castings, and machining the projectiles would be work contemplated by the contract unless the castings or other parts are manufactured solely and exclusively for the purpose of making the projectiles; (3) that as military smokeless powder is ordinarily manufactured by the Government for its own use it falls within the proviso in the law that all classes of work which have been, are now, or may hereafter be performed by the Government shall, when performed for the Government under contract, be performed under the restrictions of section 1 of said act; and that all contracts for the purchase of such powder are therefore subject to the eight-hour restriction.

(29 Op. Atty. Gen., 534.)

OFFICERS OF THE ARMY: Status of officer accepting a recess appointment by way of promotion and retired on such appointment.

An officer of the Army was given a recess appointment, by way of promotion, to a vacancy in the next higher grade. The Senate convened in regular session after the date of said appointment, but failed to act upon the nomination of said officer to the position held by him under such recess appointment. The officer is about to reach the age of retirement.

Held, that taking into consideration the 99th Article of War, which provides that "In time of peace no officer shall be dismissed, except in pursuance of the sentence of a court-martial, or in mitigation thereof," and also the laws in force regarding promotion by seniority, an officer who accepts a recess appointment by way of promotion does so conditionally, and should the Senate fail or refuse to act upon his nomination to the position, he reverts to his former grade in the Army. *Held further*, that if an officer, while holding such recess appointment, reaches the age of retirement, he is to be retired upon the rank of the office which he holds by such recess appointment, notwithstanding the Senate may fail or refuse to confirm his nomination to such office.

(Atty. Gen., Dec. 22, 1912.)

BULLETIN 4.

BULLETIN }
No. 4. }

WAR DEPARTMENT,
WASHINGTON, *February 1, 1913.*

The following digest of opinions of the Judge Advocate General of the Army for the month of January, 1913, and digests of certain decisions of the Comptroller of the Treasury are published for the information of the service in general.

[2005454, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

H. O. S. HEISTAND,
Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

BONDS: Of guaranty; release of sureties by modification of contract.

A contract provided for the manufacture and delivery of a certain quantity of single-conductor intermediate cable. The specifications and advertisement under which the contract was let formed a part of the contract, and prohibited the use, *inter alia*, of ozokerite in the manufacture of the cable. After the greater portion of the cable had been delivered, permission was requested to use ozokerite in the compound to be put into the cable. Two bonds were given, one covering a guaranty of the cable for three years "against all defects of material and workmanship," and the other guaranteeing the faithful fulfillment of the contract. *Held*, that to grant the permission requested would amount to a substantial modification of the contract and would release the sureties on both bonds. *Advised*, therefore, if it be desired to grant the permission requested, that a supplemental contract be made modifying the original contract so as to grant such permission, and that the assent to such modification be obtained from the sureties on both bonds.

(12-331, J. A. G., Jan. 16, 1913.)

BUREAU OF INSULAR AFFAIRS: Appointment of officer as chief.

Section 5 of the act of August 24, 1912 (37 Stat., 594), provides in general that, except where otherwise specially provided, when an officer shall, under the provisions of section 26 of the act of February 2, 1901, "be appointed to an office above that of colonel his appointment

to said office and his acceptance of the appointment shall create a vacancy in the arm, staff corps, or staff department from which he shall be appointed," with further provision for his retention of relative rank in the branch of the service from which he is appointed and his return thereto upon expiration of his appointment. Section 26 of the act of February 2, 1901 (31 Stat., 755), provides—

"That when vacancies shall occur in the position of chief of any staff corps or department the President may appoint to such vacancies, by and with the advice and consent of the Senate, officers of the Army at large not below the rank of lieutenant colonel and who shall hold office for terms of four years."

At the time of the passage of this act the Bureau of Insular Affairs existed only as an administrative division in the War Department. The act of July 1, 1902 (32 Stat., 712), continued its existence under the designation of Bureau of Insular Affairs of the War Department, and the act of June 25, 1906 (34 Stat., 456), provided that:

"The Chief of the Bureau of Insular Affairs of the War Department shall hereafter be appointed by the President for the period of four years, unless sooner relieved, with the advice and consent of the Senate, and while holding that office he shall have the rank, pay, and allowances of a brigadier general."

Held, that while the language of the law providing for the appointment by the President of the Chief of the Bureau of Insular Affairs with the rank, pay, and allowances of a brigadier general is similar to the terms of section 26 of the act of February 2, 1901, providing for the filling of vacancies in the position of chief of staff corps or departments, the former makes no reference to said section 26, but provides a special means for filling the position of the Chief of the Bureau of Insular Affairs and preserves the feature of the initial legislation with reference to said bureau which did not limit the field of selection of the chief thereof to officers of certain grades. Section 5 of the act of August 12, 1912, does not, therefore, apply to the position of Chief of the Bureau of Insular Affairs.

(6-229.1, J. A. G., Jan. 30, 1913.)

CLERKS AND EMPLOYEES: Civil Service; furnishing notice of cause of removal.

Section 6 of the Post Office appropriation act of August 24, 1912 (37 Stat., 555), provides that no person shall be removed from the classified civil service except for such cause as will promote the efficiency of said service and for reasons given in writing, and that the person whose removal is sought shall have:

"Notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing."

A marine engineer in the classified service, who had been appointed to a position on a boat, was discharged from the service by reason of the fact that the boat was not to be continued longer in commission, although it was stated that reasons existed for preferring charges against him. *Held*, that the statute requiring notice in writing of the reasons for the removal of an employee in the classified service does not apply to cases of removal occasioned by the fact that the

services of the employee are no longer required, but only to cases where it is proposed to remove such employee for delinquency or misconduct, and that the law has no application to this case.

(16-320, J. A. G., Jan. 10, 1912.)

CONTRACTS: Supplemental; modification of original contract and adjustment of damages.

A contract was entered into after due advertisement for the sinking of two wells and for the furnishing of windmills, engines, and pumps therefor. After the work had been begun, it was found that the location selected by the military authorities was unsuitable and the work was ordered suspended. After some delay a new site was chosen, but it was found that the amount allotted for the work would not be sufficient to pay for the removal of the contractor's outfit and the boring of two new wells, including payment for the work done at the old location and a just compensation to the contractor for the delay. *Held*, that the heads of departments have authority to enter into supplemental agreements modifying existing contracts where such agreements are in the interest of the United States, and that it is permissible in the present case to enter into a supplemental contract with the original contractor for sinking one well and for furnishing it with certain appliances, and also for furnishing certain material for another well. *Held further*, that the former bidders for the work have no right or interest therein after the awarding of the contract, nor have they any interest in the modifications of such contract.

(76-420, J. A. G., Jan. 16, 1913.)

DAMAGES: Liability of a municipality for, caused by failure to keep bridge in repair.

Certain property of the United States was damaged by the giving away of a defective bridge within the corporate limits of a town which was charged with the duty of keeping said bridge in repair. The law of the State makes a town liable for damages resulting from the insufficiency or want of repair of a bridge within its corporate limits and which it is bound to maintain, but provides further that the person damaged shall within twenty days after the damage occurs serve upon one or more selectmen of the town a written notice pointing out, among other things, in what respect the bridge was insufficient or out of repair and stating that the person damaged will claim satisfaction from the town. The notice in this case consisted in sending to a selectman of the town a copy of the report of the Army officer detailing the time, place, and circumstances of the accident which occasioned the damage, but it did not appear that it was stated that the United States would claim satisfaction for the injury, nor was it pointed out in what respect the bridge was insufficient or out of repair, although one of the selectmen was present at the scene of the accident and the cause thereof was patent to him.

Held, that the liability of the town for the damages resulting from the failure to keep the bridge in proper repair is statutory, and all the requirements of the law with respect to notice must be com-

plied with in order to fix the liability; and that as the notice in this case failed to specify that the United States would claim satisfaction from the town and failed to point out in what respect the bridge was insufficient or out of repair, it is fatally defective and the town cannot be held liable for the damages, and it is immaterial that one of the selectmen may have had actual notice of the defective condition of the bridge.

(80-011, J. A. G., Jan. 25, 1913.)

DESERTION: Removing charge of, under the act of March 2, 1889.

Section 1 of the act of March 2, 1889 (25 Stat., 869), provides for the removal by the Secretary of War of a charge of desertion standing on the rolls or records of The Adjutant General's Office against any volunteer soldier of the Civil War where it appears to the satisfaction of the Secretary of War from such rolls and records or from other testimony—

"That such soldier served faithfully until the expiration of his term of enlistment, or until the first day of May, anno Domini eighteen hundred and sixty-five, having previously served six months or more, and, by reason of absence from his command at the time the same was mustered out, failed to be mustered out and to receive an honorable discharge."

Section 7 of the same act provides that the same shall not be so construed as to relieve any soldier from the charge of desertion who left his command under certain special conditions therein stated.

A soldier enlisted for three years September 16, 1863, and served faithfully until October 15, 1865, on which date he was charged with having deserted. He returned November 7, 1865, and was again charged with desertion April 1, 1866. His company was mustered out May 14, 1866. *Held*, that the question of the removal of the charge of desertion can not be affected simply because the soldier was charged with desertion twice subsequent to May 1, 1865, the purpose of the statute being to clear the military records of soldiers whose service measured up to its requirements, and the charge contemplated being not a mere entry on the record, but rather a status of questionable honor resulting from the imputation carried by the record; and further *Held*, that the charge of having deserted October 15, 1865, can not be held to render the faithful service prior to May 1, 1865, as other than faithful, so as to work a denial of the benefit of the statute; and that if it appears to the satisfaction of the Secretary of War that the applicant otherwise meets the requirements of the statute, the charge of desertion should be fully removed.

(26-541, J. A. G., Jan. 24, 1913.)

DETACHED SERVICE: Duty in command of machine-gun platoon consisting in part of detached portion of the company to which the platoon commander belongs.

A first lieutenant of infantry requested credit as for duty with his company within the meaning of the detached-service provision of the act of August 24, 1912 (37 Stat., 571), for the period during which

he was in command of the machine-gun platoon of the regiment, the platoon being composed in part of a detachment consisting of one corporal and six privates of the company to which the officer belonged by formal assignment. He claimed that while on duty in command of the platoon he was at all times on duty with a detachment from the company to which he was assigned, and in addition was always considered as available for duty with the company and attended formations with the company, such as parades, reviews, etc., when the machine-gun platoon as such was not present at those formations.

The enlisted personnel of the machine-gun platoon of a regiment is made up of enlisted men detached from several companies of the regiment, and although the platoon is not a statutory organization, it is in fact a separate organization having no necessary relation with any of the companies of the regiment, except in so far as the members of the platoon may be carried on the rolls of the statutory organizations from which such members have been detached for the purpose of assigning them to duty with the platoon (G. O. No. 113, War Dept., 1906; G. O. No. 47, War Dept., 1910). The platoon is an adjunct or provisional unit of the regiment, or of one of the battalions thereof, but not of any company. The captain of the company from which the platoon commander is detailed has no more to do with the command of the platoon than has any other captain of the regiment.

Applying the principle laid down in a former opinion (6-124, Nov. 18, 1912) to determine when an officer commanding a detached portion of his company is to be considered as actually present for duty with his company, *Held*, that a lieutenant in command of a machine-gun platoon is, as such commander, to all intents and purposes detached from the company to which he may have been formally assigned; and the mere fact that a portion of the personnel of the platoon is drawn from the company to which the platoon commander stands formally assigned can not serve to make his performance of duty with the platoon duty with his company in the sense of the detached-service provision of the act of August 24, 1912.

(6-124, J. A. G., Jan. 15, 1913.)

DETACHED SERVICE: Duty with company; attending as a witness in obedience to a subpoena.

A captain of infantry whose detachment from his company was forbidden by the act of August 24, 1912 (37 Stat., 571), relating to detached service, was subpoenaed to attend as a witness at a trial before a civil court. His company and battalion were under orders to leave for another station and the obedience of the subpoena would necessitate a separation from his company. *Held*, that while the officer is absent from his company in obedience to a subpoena, he is not actually present for duty "with his organization," but he is not to be considered as detached from his organization "for duty of any kind" in such sense as to bring into operation the penalty clause of the statute, nor should he be considered as so detached if permitted, after service of the subpoena, to delay his departure until after the date set for the trial at which he is to testify.

(6-124, J. A. G., Jan. 10, 1913.)

DETACHED SERVICE: An officer commanding a detached portion of his company.

In an opinion of September 16, 1912, it was said that—

"An officer who commands a detached portion of his troop, battery, or company * * * must, under these conditions, be held, I think, to be actually present for duty with his organization."

In commenting upon the unmistakable meaning of the above expression (now embodied in substance in par. 8, G. O. 44, W. D., Nov. 6, 1912), it was *held*:

"Its primary purpose was to cover the case of an officer who, while standing in the regular and normal duty relation to his company, nevertheless is detached for the purpose of the further performance of duties incident to that relation with a portion of the company, and retains his normal duty status to that portion and to the company after detachment. Such an officer continues to do duty with his company, for the act of detachment creates no new organization, but makes within and under the company organization a different disposition of the company for the better performance of its duties. Therefore the detached portion is and remains an integral portion of the company, and the company officer on duty with it, being on duty with an integral portion of *his* company, is on duty with his company. The status remains unbroken; it is not affected by the act of detachment, it suffers no change during the period of detachment, nor will it be affected by the act of rejoining. Because of the continuity of the status the officers and men follow the fortunes of the detachment throughout the period of detachment, and upon rejoining proceed to perform their normal duties without the necessity of further authority to that end, and, indeed, they must do so unless competent authority intervenes and directs otherwise."

(6-124, J. A. G., Nov. 18, 1912.)

DETACHED SERVICE: Ordnance Department; detachment or detail of an officer to take an examination with a view to detail to said department.

The question was submitted as to whether a second lieutenant in the Coast Artillery Corps might be ordered to take the examination for detail to the Ordnance Department notwithstanding he had served less than two years with his corps, in view of the provisions of the Army appropriation act of August 24, 1912 (37 Stat., 571). Said act provides that on and after December 15, 1912, no officer of rank below that of major shall be detached from his troop, battery, or company "for duty of any kind" unless he shall have been actually present for duty with his troop, battery, or company for at least two out of the last preceding six years, but adds: "Nor shall anything in this proviso be held to apply to the detachment or detail of officers for duty * * * in the Ordnance Department." *Held*, that an officer who had not had the requisite service with his company to entitle him to detachment or detail for other duty generally, might nevertheless be directed to take the examination for fitness for detail to the Ordnance Department.

(6-124, J. A. G., Jan. 7, 1913.)

EXTRA DUTY: Construction of statutes; detailing men on extra duty in the Quartermaster Corps.

An opinion was requested as to whether it would be legal to continue the temporary employment of enlisted men on extra duty in the Quartermaster Corps after the provisions of section 4 of the Army appropriation act of August 24, 1912 (37 Stat., 593), relating to the enlistment of men in the Quartermaster Corps to take the place of enlisted men detailed therein on extra duty, shall have been carried into full effect.

Section 1287 of the Revised Statutes, as amended by the act of July 5, 1884 (23 Stat., 110), authorized the employment of enlisted men on extra duty. Section 4 of the act of August 24, 1912, *supra*, authorized the enlistment in the Quartermaster Corps of a certain number of men to permanently replace, among others, all enlisted men of the line of the Army detailed on extra duty in said corps. *Held*, that said act of August 24, 1912, did not expressly or by implication repeal section 1287, Revised Statutes, and amendments, authorizing the employment of enlisted men on extra duty, and that, after the enlisted men of the line of the Army employed on extra duty in the Quartermaster Corps have been substituted by the full number authorized to be enlisted for this purpose by section 4 of the act of August 24, 1912, additional men may be detailed on extra duty in said corps pursuant to said section 1287 should such detail, in the judgment of the administrative officers, be deemed necessary.

(6-224.1, J. A. G., Jan. 17, 1913.)

LINE OF DUTY: Effects of operation to remove a physical defect existing before entering the service.

A surgical operation was performed upon an officer to remove a physical defect existing before he entered the service, as a measure of caution by creating a physical condition favorable to the officer's health. The operation caused an illness which had been entered upon the records as not in line of duty. The defect was not the result of the officer's misconduct nor was it such as to unfit him for duty. *Held*, that the operation may be regarded as the proximate cause of the illness and not the defect itself which existed prior to his entering the service. The illness should therefore be entered upon the records as in line of duty.

(54-011, J. A. G., Jan. 11, 1913.)

MEDICAL TREATMENT: Officer injured while on leave.

An officer while on leave voluntarily engaged in the work of inspecting horses to be purchased by officers of the Army not required to be mounted, and while so engaged was severely injured by being kicked by one of the horses he was inspecting. The services of a civilian physician were procured and on his advice a special train was hired to take the officer to his station, where he was received into hospital. He was sick from the effects of the injury for a

period in hospital and afterwards in quarters, which sickness was characterized as in line of duty. *Held*, that officers on leave can not claim the benefit of medical attendance at the expense of the Government when away from their proper stations, and neither the bill for the services of the civilian physician nor that for extra train service can be paid from public funds. *Held further*, that the fact that the officer's sickness while in hospital and in quarters was characterized as in line of duty does not affect the situation, as after his return to his station he was no longer in a leave status.

(72-300, J. A. G., Jan. 28, 1913.)

NATIONAL CEMETERIES: Superintendents; evidence of disability of applicant for position of.

Section 4874, Revised Statutes, provides:

"The superintendents of the national cemeteries shall be selected from meritorious and trustworthy soldiers * * * who have been honorably mustered out or discharged * * * and who may have been disabled for active field service in the line of duty."

A soldier of the Civil War was enlisted and had been a prisoner. He was paroled, and afterwards discharged by order of a civil court, a corporal, on account of his being a minor, and enlisting without the consent of his parents. *Held*, that there is nothing in this record to show that the soldier was "disabled for active field service in the line of duty," but the reason given for his discharge would indicate that he was not so disabled, and the soldier is not eligible for appointment as superintendent of a national cemetery.

(80-413, J. A. G., Jan. 3, 1913.)

The applicant for the position of superintendent of a national cemetery, an ex-soldier, had theretofore filed a claim for pension based upon disability incurred in the military service. His claim was rejected upon the ground of insufficient evidence. Congress subsequently granted him a pension by private act. The report of the congressional committee in his case shows that while there existed some evidence of disability incurred in the service, it was not sufficiently conclusive to establish his claim under the law, but that the soldier should, in view of all the facts in the case, be given the benefit of the doubt. *Held*, that the action of Congress in granting the pension may be accepted as a sufficient basis for regarding the disability as incurred in the service so as to bring the applicant within the provisions of section 4874, Revised Statutes, and that he can legally be appointed to the position of superintendent of a national cemetery.

(80-413, J. A. G., Jan. 17, 1913.)

OFFICERS: Promotion; suspension from, for one year for failure to pass examination other than physical.

Section 5 of the act of October 1, 1890 (26 Stat., 562), reads in part "That the President be, and he is hereby, authorized to prescribe a system of examination of all officers of the Army below the

rank of major to determine their fitness for promotion. * * * *And provided*, That if any officer fails to pass a satisfactory examination and is reported unfit for promotion, the officer next below him in rank, having passed such examination, shall receive the promotion."

After providing for the retirement of an officer found incapacitated for service by reason of physical disability contracted in line of duty, the statute adds:

"But if he should fail for any other reason, he shall be suspended from promotion for one year, when he shall be reexamined, and in case of failure on such reexamination he shall be honorably discharged, with one year's pay, from the Army."

Upon examination for promotion, a captain of Field Artillery was found and reported deficient in his practical knowledge of the drill regulations of his arm of the service. His promotion to the next higher grade was therefore not recommended by the examining board. The proceedings and finding of the board were duly approved and the officer notified accordingly, and he was also notified that he had been suspended from promotion for one year under the provisions of the act of October 1, 1890. He subsequently submitted statements to the effect that he had been detached from duty with his branch of the service during the greater portion of the four years immediately preceding his examination, and had been engaged upon duty which did not give him an opportunity to become practically proficient or to remain practically proficient in the handling of a battery or battalion of Field Artillery. He accordingly requested that his examination be "resumed" after a suitable period of service with his regiment for further determination of his fitness for promotion.

Held, that as the officer has been duly examined according to law and regulations and found and declared to be disqualified for promotion; as the law by necessary implication forbids a reexamination or a second examination until after suspension from promotion for one year; as the duly qualified officer next below the one found deficient has become entitled to promotion in advance of the latter; and as the statute applicable to the case has in fact been put in operation, an order purporting to "extend," or to authorize the "resumption" of, the examination of the officer found deficient, "with a view to determining more satisfactorily certain questions concerning his qualifications," would amount to a revocation of the final approval theretofore given in respect of his examination, would result in granting him a reexamination or a second examination without subjecting him to the suspension from promotion which the law requires, and might deprive another officer of an accrued legal right; and that, therefore, such order may not legally be issued. C. 13244, Sept. 2, 1902; C. 22818, April 21, 1908; C. 28645, July 5, 1911.

(64-221.3, J. A. G., Jan. 28, 1913.)

OFFICERS: Resignation of, to take effect at a future date and withdrawal after acceptance.

An officer of the Army tendered his resignation to take effect at a future date, which resignation was duly accepted by the President. Thereafter and before the time for his resignation to take effect he desired to withdraw the same. *Held*, that as the resignation ten-

dered had not in fact become effective, as the individual who had tendered the same was still an officer of the Army, and as no rights of another had intervened, the acceptance of the tender may be recalled and the officer permitted to withdraw the same. 14 Op. Atty. Gen., 261; Throop on Public Officers, 406.

(64-334, J. A. G., Jan. 25, 1913.)

PAY CLERKS: Of the Army; assignment of quarters to, at a post where there are troops.

By the act of March 3, 1911 (36 Stat., 1044), it was provided that the pay and allowances of Army paymasters' clerks (now pay clerks) "shall be the same as provided by law for Navy paymasters' clerks on shore duty." Paymasters' clerks in the Navy are by law entitled to receive the same pay and allowances "as warrant officers of like length of service in the Navy." The act of March 3, 1901 (31 Stat., 1107), provides that warrant officers of the Navy shall receive "the same commutation for quarters as second lieutenants of the Marine Corps"; and by section 1612, Revised Statutes, officers of the Marine Corps receive the same pay and allowances as officers of like grade in the Infantry of the Army.

On application of a pay clerk serving at a post where there were troops for assignments of quarters, *Held*, that he is entitled when on duty at a post with troops to the same number of rooms as quarters as a second lieutenant of the Army, and to such quarters as may be assigned to commissioned officers, but that he has no right of selection under paragraph 1042, Army Regulations of 1910, of quarters occupied by any commissioned officer.

(6-134, J. A. G., Jan. 17, 1913.)

PAY OF SOLDIERS: Deduction of pay for absence from duty by reason of intemperate use of drugs or alcoholic liquors, or other misconduct.

The Army appropriation act of August 24, 1912 (37 Stat., 572), provides:

"No officer or enlisted man in active service who shall be absent from duty on account of disease resulting from his own intemperate use of drugs or alcoholic liquors, or other misconduct, shall receive pay for the period of such absence from any part of the appropriation in this act for the pay of officers or enlisted men."

Cases were presented of several soldiers who, through their own misconduct prior to their present enlistment and prior to the passage of the act, had become infected with venereal disease, which necessitated their treatment in hospital and consequent absence from duty. *Held*, that the act in question, having for its object the regulation of the future conduct of the soldier and not merely the saving which might result to the United States by the deduction of pay for absences occasioned by their misconduct, is prospective in its operation and penalizes only misconduct and its consequent absence occurring after the passage of the act and after the beginning of a soldier's current enlistment; it is not to be construed as penalizing past offenses. No deductions should therefore be made from the pay of soldiers absent from duty resulting from misconduct which occurred before the passage of the act or before their current enlistments began. *Held, fur-*

ther, that where a soldier suffering from a disease acquired through his misconduct is properly ordered to hospital for treatment, notwithstanding he may be able to perform duty at the time, the absence from duty occasioned thereby must be regarded as caused by his own misconduct, and if the case falls within the operation of the law a deduction of pay should be made accordingly.

(72-214, J. A. G., Jan. 23, 1913.)

NOTE.—The above views were concurred in by the Comptroller of the Treasury in a decision of January 30, 1913, to the Secretary of War.

QUARTERS: Change of station; commutation.

An officer was ordered to proceed from a post where he had been stationed to a city to take charge of a recruiting office at that place "until further orders." After three months he was relieved by another officer under orders which recited that the first officer, upon being thus relieved, "will return to his proper station." The first-mentioned officer, before entering upon duty at the recruiting station, asked permission for his family to occupy his quarters at his old station until he could determine the length of his detail or make other arrangements, such occupancy not to deprive any other officer of the use of said quarters, which request was approved by the commanding officer. *Held*, that the officer's orders effected a change of station from the place where he had been on duty to the recruiting station, and that he was entitled to commutation of quarters at the latter station upon making the usual showing required in order to obtain this allowance.

(72-333, J. A. G., Jan. 20, 1913.)

RESPONSIBILITY: Erroneous entry of period of enlistment on a soldier's descriptive card.

The recruiting officer at a post entered upon a descriptive and assignment card of a recruit that he was serving in his second enlistment period, when, as a matter of fact, the papers disclosed that he was serving only in his first enlistment. The adjutant general of the post with the same data before him certified to the correctness of this entry. The soldier was transferred to a company on such descriptive and assignment card, and overpaid in consequence of the erroneous entry. *Held*, that the responsibility for the overpayment rests upon both the recruiting officer and the adjutant of the post, and that they should contribute equally to making good the overpayment.

(72-515.1, J. A. G., Jan. 6, 1913.)

RETIREMENT: Service required; counting double time for service in the Philippine Scouts.

The act of February 14, 1885 (23 Stat., 305), authorizes the retirement of enlisted men after thirty years' service, and the acts of March 2, 1903 (32 Stat., 934), and of June 12, 1906 (34 Stat., 248), provide that where enlisted men have served "as commissioned officers of

Philippine Scouts," and after muster out or discharge, shall return to the ranks of the Regular Army, they shall be entitled to count the service in computing the time necessary to enable them to retire as enlisted men. The act of April 23, 1904 (33 Stat., 264), provides for double credit for service in the Philippine Islands in computing length of service for retirement. The Army appropriation act of August 24, 1912 (37 Stat., 575), prohibits credit for double time for foreign service in computing length of service for retirement "to those who hereafter enlist."

Held, that in view of section 6 of the act of February 2, 1901 (31 Stat., 757), which authorizes the appointment of enlisted men of the Regular Army as commissioned officers of the Philippine Scouts for periods of four years each, commissions in the Philippine Scouts may be construed as analogous to enlistment periods, and that where the commission was issued prior to August 24, 1912, service therein during the four-year period should be counted as double time for purposes of retirement. *Held, further*, that service under each commission for a further term of four years after August 24, 1912, or under a reenlistment in the Army after said date, comes within the operation of the act, and that such service can not be counted double for retirement purposes.

(88-823, J. A. G., Jan. 7, 1913.)

TRANSPORTATION: Of horses of officers on change of station; shipment in excess of the authorized number from point of purchase to last station.

The act of March 23, 1910 (36 Stat., 255), provides that—

"Hereafter transportation may be furnished for the owned horses of an officer, not exceeding the number authorized by law, from point of purchase to his station, when he would have been entitled to and did not have his authorized number of owned horses shipped upon his last change of station, and when the cost of shipment does not exceed that from his old to his new station."

Held, that it would be feasible to provide by regulation that an officer might have his authorized number of horses transported at Government expense from place of purchase to his last station under the conditions stated under said act, even though the cost of such transportation be greater than the cost from his old to his new station, upon depositing with the shipping officer an amount sufficient to cover such excess of cost.

(94-231.1, J. A. G., Dec. 20, 1912.)

Upon consideration of the question as to whether an officer might procure the shipment of horses owned by him in excess of the number which he is entitled to have maintained at public expense from point of purchase to last station, by first paying to the shipping officer the cost of such shipment, *Held*, that the shipment of such horses on a Government bill of lading with the horses he is entitled to keep and use in the Government service is not authorized, even though the officer should advance an amount sufficient to pay for such shipment. 18 Comp. Dec., 494.

(94-231.1, J. A. G., Jan. 16, 1913.)

TRAVEL ALLOWANCES: Of discharged soldiers; furnishing subsistence during travel over a longer route.

The Chief of the Quartermaster Corps submitted the question of whether, under the provisions of the act of August 24, 1912 (37 Stat., 576), in furnishing transportation in kind and subsistence to soldiers on discharge, such transportation may be furnished "via any route between competitive points where the cost of transportation and sleeping-car accommodations does not exceed the cost via the route over which the official distance is figured as published in the official distance table of the War Department," provided that no additional cost of subsistence is paid on account of the additional travel involved in the selection of the longer route.

Held, that the transportation authorized is between points and there is no provision that it shall be over the shortest usually traveled route, although travel could not properly be allowed over a longer route if the cost, including commutation of subsistence, be greater than over the shorter route; but if such cost is greater over the longer route, transportation over such route may nevertheless be furnished if the soldier indicates his preference to travel over such route and his willingness to accept commutation of subsistence not exceeding the amount he would receive should he travel over the shorter route.

(94-332, J. A. G., Jan. 27, 1913.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

FORAGE ALLOWANCE: Officers of the Medical Reserve Corps on leave of absence.

An officer of the Medical Reserve Corps of the Army on active duty was granted a leave of absence and ordered to his home to be relieved from active duty at the expiration of the said period of leave. The question was submitted by the Secretary of War as to whether or not he was entitled to be furnished forage by the Quartermaster Corps for mounts owned and kept by him at his home during the period of his leave of absence.

The act of April 23, 1908 (35 Stat., 68, 69), provides for the issue of commissions as first lieutenants to certain graduates of medical schools found qualified on examination, which commissions shall confer upon the holders "all the authority, rights, and privileges of commissioned officers of the like grade in the Medical Corps of the United States Army, except promotions, but only when called into active duty," as thereafter provided, "and during the period of such active duty." The act further provides that during the period of such active service said officers "shall be entitled to the pay and allowances of first lieutenants of the Medical Corps." *Held*, that the acts of June 18, 1878 (20 Stat., 150), and February 24, 1881 (21 Stat., 347), providing for the furnishing of forage in kind to officers of the Army who own and keep their own mounts, contemplate the furnishing of such forage to officers for horses owned and kept by them in the performance of their official military duties when on duty as in said act specified, and at places where they are

on duty, and that an officer on leave of absence is not on duty and is not entitled to forage for a horse owned and kept by him while in that status.

(Comp. of the Treas., Jan. 17, 1913.)

HEAT AND LIGHT ALLOWANCE: Payment of full allowance; reimbursement for amount used.

An officer whose authorized allowance for quarters was five rooms, occupied as quarters a private residence consisting of ten rooms, heated by natural gas and lighted by electricity, having but one meter for gas and one for electricity. Through a misunderstanding the accounts for heat and light were paid direct by the officer entitled to the allowance, and he was reimbursed by the Quartermaster to the maximum allowance prescribed for an officer of his grade in paragraph 1073, Army Regulations, 1910. The amounts were disallowed by the Auditor for the War Department in the Quartermaster's accounts, and the officer was called upon to refund the amounts paid. On application to the Comptroller of the Treasury the disallowance made by the auditor was sustained upon the authority of a decision of the comptroller dated March 16, 1912, holding that where an officer occupies as quarters his own private residence containing more rooms than are prescribed by law as the authorized allowance for an officer of his rank, the Quartermaster's Department is authorized to supply heat and light necessary for his quarters not to exceed the quantity prescribed by regulations for the number of rooms to which his rank entitles him, and that an officer, under such circumstances, is not entitled to commutation of the heat and light allowances. On consideration of the case as a request for an advance decision, *Held*, that upon the presentation of proper vouchers the officer in this case can now be reimbursed to the extent of the gas and electricity consumed by him not exceeding the amount allowed by regulations for his quarters for the period in question, and that the officer having used during said period 386,000 cubic feet of gas for heating, he may be reimbursed for the cost of 159,000 cubic feet, the amount of his allowance, at regulation rates, and that having used 317,000 watt hours of electric current for the same period for light, as against his allowance of 516,000 watt hours for the same period, he can be reimbursed for the cost of the full amount used at regulation rates.

(Comp. of the Treas., Jan. 6, 1913.)

HEAT AND LIGHT ALLOWANCE: To officers on promotion; date upon which increased allowance becomes effective; Naval officer.

Section 13 of the Navy personnel act of March 3, 1899 (30 Stat., 1007), provides that commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same allowances, except forage, as are or may be provided by law for officers of corresponding rank in the Army. The question was submitted as to the date from which the landlord of a naval officer in receipt of commutation of quarters was entitled to increased compensation, by reason of the officer's promotion, for furnishing such officer with heat and light. The officer's *ad interim* commission was signed by the

President November 19, 1912, but the appointment was to fill a vacancy by promotion and the officer took rank from August 22, 1912. After referring to the laws and regulations governing heat and light allowances for officers of the Army and to a prior decision of the office, it was *Held*, that the landlord became entitled to be paid for heat and light furnished at the rate allowed for an officer of the grade to which the officer was promoted only from November 19, 1912, the date of his *ad interim* appointment, and not from the date when he was to take rank.

(Comp. of the Treas., Jan. 8, 1913.)

TRAVEL ALLOWANCES: Mileage and expenses; change of station while on leave.

A lieutenant of the Coast Artillery while stationed in the Philippine Islands was transferred to a post in the United States, the change to become effective October 1, 1912. Prior to this date, he was given leave of absence with permission to return to the United States by way of Europe and thereupon he was to join his new station. While on this leave, his station in the United States was again changed, and he was ordered to proceed to the new station thus designated. He did not receive this order until after his arrival in the United States and near the post to which he had been at first ordered. He thereupon proceeded to join his new station.

The law authorizing the payment of mileage to officers of the Army is found in the act of June 12, 1906 (34 Stat., 247), which act, after fixing the allowance, provides that—

“When the station of an officer is changed while he is on leave of absence he will on joining the new station be entitled to mileage for the distance to the new station from the place where he received the order directing the change, provided the distance be no greater than from the old to the new station; but if the distance be greater he will be entitled to mileage for a distance equal to that from the old to the new station only: *And provided further*, That for all sea travel actual expenses only shall be paid to officers * * *.”

Held, that the law relating to change of station while an officer is on leave applies to those cases where he is under orders to return to his old station, and that as at the time of going on leave this officer was under orders to change station without troops with destination at a post in the United States, such provision does not apply, and he is entitled to mileage and actual expenses which the law gives for travel, from his station in the Philippine Islands to the last station to which he was ordered in the United States; and in determining such actual expenses across the Pacific Ocean, the amount generally paid by an officer for subsistence on a transport at or about the time the officer was relieved from duty in the Philippine Islands may be accepted as the amount due for such portion of the journey. The order changing his destination after he had gone on leave amounted to a modification of his former order, and did not amount to a change of station from the post to which he first had been ordered in the United States, and where he could not have acquired a station until his arrival thereat.

(Comp. of the Treas., Jan. 9, 1913.)

BULLETIN 8.

BULLETIN }
No. 8. }

WAR DEPARTMENT,
WASHINGTON, March 18, 1913.

The following digest of certain opinions of the Judge Advocate General of the Army for the month of February, 1913, and of certain decisions of the Comptroller of the Treasury and of the Court of Claims, is published for the information of the service in general.

[2019594, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:
GEO. ANDREWS,
Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ABSENCE: From duty due to misconduct; stoppage of pay.

The Army appropriation act of August 24, 1912 (37 Stat., 572), provides that a soldier shall not receive pay from the appropriation contained in the act while he may be absent from active duty on account of disease "resulting from his own intemperate use of drugs, or alcoholic liquors, or other misconduct." A soldier was sick in hospital for one day and consequently absent from active duty by reason of injuries received in a fist fight in which he voluntarily engaged. *Held*, That the words "other misconduct" in the statute is limited by the rule of *ejusdem generis* to conduct of the same general character as that indicated by the words preceding them, to wit, "intemperate use of drugs, or alcoholic liquors" (36 Cyc., 1119), or misconduct consisting in the intemperate or improper indulgence of natural or acquired appetites; that the misconduct of the soldier in this case was not of such general character; and that no deduction should be made from his pay while absent from active duty on account thereof.

(72-210, J. A. G., Feb. 14, 1913.)

CONTRACTORS: Damage to heating system while under control of contractors before being turned over to United States.

Compensation for damages was claimed by contractors, who were installing a hot water heating system at an Army post, for injuries to said plant caused by freezing. At the time the damage occurred the system was being adjusted by the contractors prior to accept-

ance by the United States and was under their control. No instructions were given by the contractors relative to the proper operation of the system, and it appeared that when the valves of said system were closed they entirely stopped the flow of water, it being in this respect unlike many other systems, which allow a slight flow at all times in order to prevent freezing.

Held, that the system being under the control of the contractors at the time the damage occurred, and the contractors having been negligent in not taking proper steps to prevent injury from freezing, the claim for extra compensation on account of such injury should be disallowed.

(76-732, J. A. G., Feb. 21, 1913.)

CONTRACTS: Assignment of when original contractor is unable to complete the work.

A company having a contract with the United States to supply coal during the fiscal year ending June 30, 1913, became financially embarrassed and a new company was organized by the principal stockholders of the old company to continue the business of the old company, and the contract assigned to such new company. The surety company guaranteeing the old contract executed a supplemental instrument whereby it agreed that its bond should cover the faithful performance of the contract by the assignee.

Held, that while the better form would have been a tripartite contract supported by a new bond whereby the assignee would contract directly with the United States for the completion of the contract and the assignor would agree directly with the United States that all payments should be made to the assignee, the facts here stated are not such as to bring the case within the prohibition of section 3737, Revised Statutes, forbidding the transfer of contracts with the United States, and the Chief of the Quartermaster Corps may therefore approve the assignment.

(76-520, J. A. G., Feb. 20, 1913.)

CONTRACTS: Parties to; including persons other than the bidder.

A contract was awarded to a party for the construction of a power plant under the War Department upon a bid submitted under instructions which required the bidder to enter into a contract and to give bond with satisfactory surety for its faithful performance, including also a stipulation for the protection of laborers and material men. The contractor signed the contract but, owing to his financial condition, was unable to furnish the required bond for the due performance of the contract, because of which the same was not signed on behalf of the United States. In order to secure such surety it was requested that a representative of a surety company be permitted to join as a partner in the contract, so as to give the surety company such joint control of the receipts and disbursements arising out of the contract as would make it reasonably safe for the company to become surety for the due performance of the work and for the payment of laborers and material men.

Held, that there is no legal objection to permitting the representative of the surety company to be joined as a copartner or as a joint contractor, as may be desired; and that the position of the representative of the surety company should not be regarded as disqualifying that company from becoming surety on the bond, there being no law or regulation prohibiting it.

(76-331.2, J. A. G., Feb. 24, 1913.)

CONTRACTS: Purchase in open market after advertising without result.

Bids were opened at various points after due advertisement, for the purchase of marching shoes manufactured in accordance with Government specifications. Only one bid was received, that being submitted by a manufacturer at Boston, Mass., and a contract was awarded to such bidder for the shoes covered by the advertisement. Telegrams were sent to the depot headquarters at said points to ascertain and report why shoe manufacturers other than the one named had failed to bid under the advertisement. The replies received showed that the manufacturers gave various reasons for such failure, the principal ones being that the specifications and inspection of the Government were too rigid, and that the marching shoes of the new pattern were of a type not in general use by the public so that there would be difficulty in disposing of rejected shoes without considerable loss.

Held, that under these circumstances the law regarding advertising for contracts may be regarded as substantially complied with, the failure of the bidders to submit bids and the result of the inquiries following such failure clearly showing that further advertising for shoes at this time would be useless; and that therefore a contract may now be made for the purchase of shoes upon such terms as may be considered reasonable, without further advertising.

(76-125, Feb. 21, 1913.)

DETAILS: Eligibility for redetail to Ordnance Department.

Section 26 of the act of February 2, 1901 (31 Stat., 755), applicable to all staff corps and departments therein specified, including the Ordnance Department, provides that—

“When any vacancy except that of chief of the department or corps shall occur, which can not be filled by promotion as provided in this section, it shall be filled by detail from the line of the Army.

* * * Such detail shall be made from the grade in which the vacancies exist, under such system of examination as the President may from time to time prescribe.

“All officers so detailed shall serve for a period of four years, at the expiration of which time they shall return to duty with the line, and officers below the rank of lieutenant colonel shall not again be eligible for selection in any staff department until they shall have served two years with the line.”

Section 1 of the act of June 25, 1906 (34 Stat., 455), constituted the official personnel of the Ordnance Department and section 2 of

the said act made special provision for detail to said department as follows:

"That details to the Ordnance Department under the provisions of the act of February second, nineteen hundred and one, may be made from the Army at large from the grade in which the vacancy exists, or from the grade below: *Provided*, That no officer shall be so detailed except upon the recommendation of a board of ordnance officers, and after at least one examination, which shall be open to competition: *And provided further*, That officers so detailed in grades below that of major shall not be again eligible for such detail until after they shall have served for at least one year out of that department."

A captain in the Coast Artillery Corps, while a first lieutenant therein, was detailed as captain in the Ordnance Department, was promoted to the grade of captain in his corps, and was thereafter relieved from his detail in the Ordnance Department. It was desired to redetail him as major in the Ordnance Department before he had served one year out of that department.

Held, that although section 26 of the act of February 2, 1901, was applicable to the Ordnance Department, the act of June 25, 1906, prescribed a special rule for that department, and while the former prescribes as a general rule for eligibility for redetail an intervening service of two years with the line, redetails may be made under the latter act to the Ordnance Department after a service of at least one year out of that department; *held further*, that the requirement of one year's service out of the department applies only to details below the grade of major, and that the officer relieved from duty under his detail as captain is not ineligible for redetail to the department in the grade of major, although he may not have served for one year outside of that department since he was relieved from his detail as captain therein.

(6-225 J. A. G., Feb. 12, 1913.)

DISCHARGE: Character of, after returning from desertion under the President's proclamation of March 11, 1865.

A soldier enlisted July 1, 1860, for five years and deserted July 29, 1863. While still a deserter and during the war he was mustered into the volunteer service, from which he deserted and enlisted in another organization of the volunteer service which he abandoned in order to surrender himself, under the President's proclamation of March 11, 1865, as a deserter from his original service. He was discharged from his first service by reason of expiration of term March 13, 1867, having made good time lost in desertion. No action was taken with respect to his desertion from the volunteer service, or with respect to his leaving the same in order to surrender himself as a deserter.

Held, that the pardon extended by the President in his proclamation to those returning from desertion within a certain time applied to all soldiers who were at the time in desertion and, therefore, to desertions from enlistments entered into prior to the beginning of the Civil War; that such pardon operated to absolve the deserter

from the consequences and disabilities attaching to that offense, but not to remove the charge or fact of desertion in either of the other two instances in the present case; *held further*, that this soldier was honorably discharged only from his first enlistment and from no other organization in which he served or enlisted during the Civil War.

(26-710, J. A. G., Feb. 7, 1913.)

EIGHT-HOUR LAW: Application to verbal and other informal contracts.

The eight-hour law of June 19, 1912 (37 Stat., 137), provides, in its first section, that every contract made for or on behalf of the United States—

“Which may require or involve the employment of laborers or mechanics shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work.”

Section 3744, Revised Statutes, requires that—

“It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof.”

Held, that while verbal contracts and those evidenced by written offer and acceptance or other memoranda not amounting to a compliance with section 3744, Revised Statutes, are not binding upon the Government as to any executory portion thereof, yet when performed they are to be treated in all respects as valid contracts, and the adjustment of the rights of the parties thereto must be made according to their terms; that while in course of performance they should also be treated as valid contracts; and that the provisions of the eight-hour law of June 19, 1912, should therefore be applied to such contracts during their performance as though they had been executed according to the formalities required by law.

(32-300, J. A. G., Feb. 26, 1913.)

EIGHT-HOUR LAW: Employment of laborers and mechanics on separate contracts on the same day.

A manufacturing company had a contract with the Government coming within the operation of the eight-hour law of June 19, 1912 (37 Stat., 137), section 1 of which requires that every contract made for or on behalf of the United States involving the employment of laborers or mechanics—

“Shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day.”

Upon request for an opinion as to whether a contractor, after employing laborers and mechanics on a contract coming within the eight-hour law for eight hours in any calendar day, might continue such employment for an additional time on the same day on another contract not coming within the operation of said law, *held*, that the statute operates only upon the particular contract subject to its provisions; that the supervision by Government officials required by the statute extends only to work contemplated by the contract; and that a Government contractor under a contract coming within the operation of the law, may employ laborers and mechanics thereon for eight hours a day and thereafter continue their employment on the same day on another contract with the Government not coming within the operation of the law, without incurring the penalties prescribed by said law.

(32-300, J. A. G., Feb. 5, 1913.)

MILITIA: Organization of enlisted men of, into a reserve.

Section 3 of the act of January 21, 1903 (32 Stat., 775), as amended by section 2 of the act of May 27, 1908 (35 Stat., 399), provides that—

“On and after January 21, 1910, the organization, armament, and discipline of the Organized Militia in the several States and Territories and the District of Columbia shall be the same as that which is now or may hereafter be prescribed for the Regular Army of the United States, subject in time of peace to such general exceptions as may be authorized by the Secretary of War.”

Section 2 of the Army appropriation act of August 24, 1912 (37 Stat., 590), provides for a seven-year enlistment period, and also, among other things, provides for an Army reserve.

Held, that the Army reserve provided for by said act of August 24, 1912, is not an organization within the meaning of the act of January 21, 1903, and that the Secretary of War, under existing law, can not require the Organized Militia of the several States to organize and maintain reserves similar to that provided for the Regular Army.

(6-300, J. A. G., Feb. 17, 1913.)

OFFICERS OF THE ARMY: Appointment and lineal rank.

Section 1219 of the Revised Statutes provides—

“In fixing relative rank between officers of the same grade and date of appointment and commission, the time which each may have actually served as a commissioned officer of the United States, whether continuously or at different periods, shall be taken into account. And in computing such time, no distinction shall be made between service as a commissioned officer in the Regular Army and service since the 19th day of April, 1861, in the volunteer forces, whether under appointment or commission from the President or from the governor of a State.”

Section 3 of the act of June 18, 1878 (20 Stat., 150), provided for the filling of vacancies in the grade of second lieutenant by the

appointment of meritorious noncommissioned officers, but was silent as to the rule for determining their relative rank, and the rule remained unchanged until the act of July 30, 1892, section 3 of which provides (27 Stat., 336)—

"The vacancies in the grade of second lieutenant heretofore filled by the promotion of meritorious noncommissioned officers of the Army, under the provisions of section 3 of the act approved June 18, 1878, shall be filled by the appointment of competitors favorably recommended under this act, in the order of merit established by the final examination."

An enlisted man was in 1900 appointed a second lieutenant in the Army, after a competitive examination in pursuance of said act of July 30, 1892. He had previously seen service as a commissioned officer of volunteers in the Spanish War, which service was not taken into consideration in fixing his relative rank.

Section 28 of the act of February 2, 1901 (31 Stat., 755), created certain vacancies and prescribed a rule for fixing the rank of first and second lieutenants appointed under its provisions based on prior commissioned service.

Held, that section 1219, Revised Statutes, is general in its terms, and that the act of July 30, 1892, makes a special exception thereto in the case of persons entering the grade of second lieutenant from enlistment by providing for the fixing of their relative rank according to merit determined at the time of examination, without regard to prior commissioned service. *Held, further*, that the vacancies created by the act of February 2, 1901, were filled according to the special provision made in said act, which has no application to this officer's case, and that the officer in this case, having been appointed prior to said act, does not come within its terms so as to have his commissioned service counted, but is protected by its provisions, so that no appointee thereunder having less commissioned service than he can be placed above him as second lieutenant.

(82-131, J. A. G., Feb. 3, 1913.)

OFFICIAL RECORDS: Producing confidential, in obedience to subpoena.

A subpoena was issued out of the Supreme Court of the District of Columbia and served upon the Chief of the Quartermaster Corps requiring his appearance before a notary public to testify as a witness in a case pending between private parties in the Federal court, the purpose evidently being to secure copies of certain reports and recommendations relating to the contract referred to in the subpoena, which copies had been denied by the Acting Secretary of War.

Held, that the report of inspection and test of the samples submitted by the several competitors for a contract is confidential in its nature, and the contents should not be disclosed, as such disclosure would be contrary to public policy in that its publicity would tend to hamper the freedom of inspection and recommendation by inspecting officers; *Held further*, that the Chief of the Quartermaster Corps can not legally be required to produce or read said report in evidence.

(14-231, J. A. G., Feb. 8, 1913.)

PAY ROLLS: Certification of; muster for pay.

The certificate upon the form of pay roll approved by the Comptroller of the Treasury April 8, 1912, reads:

"I certify that I have this day mustered this organization and find all present and absent accounted for on this roll, as required by Army Regulations."

Objection was made by an officer to signing this certificate because the roll did not contain all the entries required by the Twelfth Article of War to be inserted on muster rolls, and he therefore believed that in signing such a roll he would be signing a false muster and would subject himself to the penalty prescribed in the Fourteenth Article of War.

The Army Regulations of 1910 provide as follows:

"Troops will be mustered for pay on the last day of each month unless otherwise ordered by the War Department." (Par. 447.)

"Each stated muster will, when practicable, be preceded by a minute and careful inspection." (Par. 448.)

"At every muster of troops pay rolls will be prepared, signed, and disposed of in accordance with the directions on the blank forms furnished by the Paymaster General of the Army, and at each bi-monthly muster on the last day of February, April, June, August, October, and December muster rolls will be prepared, signed, and disposed of in accordance with the directions on the blank forms furnished by The Adjutant General of the Army." (Par. 820.)

The present form of pay roll omits the names of commissioned officers of the organization, and it is directed that "only such remarks as affect the soldiers' pay will be entered" thereon. The Twelfth Article of War requires that the time of absence of officers and enlisted men, together with the reasons therefor, shall be inserted on the muster rolls opposite the names of the respective absentees.

Held, that while the present monthly pay roll has many elements in common with the bimonthly muster roll, their legal relation to the administration of the Army is not necessarily the same, and that it is clear that the Twelfth Article of War has application to the muster roll rather than to the pay roll.

(72-201, J. A. G., Jan. 23, 1913.)

NOTE.—In view of the reasons expressed in the above opinion, the Secretary of War decided that it was not necessary to amend the certificate on the pay roll.

PUBLIC PROPERTY: Title to lands in street improved at Government expense.

The streets in a city leading from a military reservation to the railroad depot and over which the bulk of the heavy hauling was that between the station and the military post, were in very bad condition, so that at times they were almost impassable. The city was not able or was not willing to repair the same at its own expense, but proposed that the Government should furnish one-third the amount necessary for the improvement and the city should furnish the other two-thirds. The commanding officer of the post was of the opinion that the proportion of cost asked from the United States was fair, considering the amount of hauling which the Gov-

ernment does over the streets in question. The Government owned neither the fee nor right of way in the streets.

Held, that as the bulk of the heavy hauling over said streets pertained to the military reservation, and as the local authorities were unwilling to pay for such repair as would answer the needs of the post without contribution from the Government toward such repair, it was competent to enter into a contract for the payment of one-third of the cost of the repair as proposed, and that the fact that the expenditure would be upon public streets over which the future hauling for the reservation would have to be done, might be regarded as ample assurance that the Government would receive the benefit of the expenditure.

(5-247, J. A. G., Feb. 24, 1913.)

RESPONSIBILITY: For damage to public property through neglect.

A private soldier was charged with the duties of janitor at a post exchange building provided with a steam-heating plant. The weather turned suddenly cold and the heating system froze up, resulting in the bursting of pipes and other connections to the damage of about \$100. The heat maintained in the system was sufficient to have prevented its freezing up under ordinary conditions at that season of the year, but not during the unusual cold spell which occurred, and the soldier was negligent in failing to keep up proper heat under the conditions which existed. The system, however, was defective in that it did not drain properly, and water was consequently left standing in the pipes, the freezing of which caused the damage.

Held, that the soldier was responsible only for the reasonable and probable results of his own negligence; that the damage was not the direct result of his neglect, but was due to the defective heating system, which should have permitted the drainage of the water from the pipes; and that consequently the amount of the damage should not be deducted from the soldier's pay. The punishment for this neglect, if any, should be inflicted through the medium of a proper court.

(80-016, J. A. G., Feb. 13, 1913.)

SUPPLIES: Electric light; payment for electric current not included in regular bills through failure to be registered by the meter.

By reason of defective wiring a portion of the current used in electric lighting at an Army post did not pass through the meter and consequently was not taken up and paid for in the monthly bills for lighting. Afterwards the mistake was discovered and a bill presented for the estimated amount of current so consumed and not paid for. The contractor furnishing the light was himself negligent in installing wiring in such a manner as to cause such defective registering of the current used. *Held*, that the previous settlements of accounts for lighting were not conclusive so as to preclude a reopening of the account and the payment for the current erroneously omitted by mutual mistake from previous bills, and

that the fact that the contractor himself may have contributed to the mistake was immaterial, as no damage was caused thereby for which compensation was sought.

(76-732, J. A. G., Feb. 21, 1913.)

SUPPLIES: Purchase of, for Walter Reed General Hospital, District of Columbia.

Section 4 of the act of June 17, 1910 (36 Stat., 531), provides generally that all supplies, fuel, ice, stationery, and other miscellaneous supplies "for the executive departments and other Government establishments in Washington," when the public exigencies do not require immediate delivery, "shall be advertised and contracted for by the Secretary of the Treasury," and provides for a general supply committee to make an annual schedule of the required miscellaneous supplies and to perform certain other duties connected with carrying the provisions of said act into effect.

On request for an opinion as to whether supplies required for the Walter Reed General Hospital, Takoma Park, D. C., must be secured under contract with the general supply committee in pursuance of said act, *held*, that inasmuch as said hospital is not a part of the civil establishment known as the War Department, but is substantially an Army hospital or post located for convenience in the District of Columbia, the supplies necessary therefor, the same as those required for the military post of Washington Barracks, should be procured under a contract made with the proper department of the Army, and that the act of June 17, 1910, has no application.

(14-120.1, J. A. G., Feb. 28, 1913.)

TRANSPORTATION: Of household effects on change of station.

An officer was directed to change station to a post where there were no available quarters for his accommodation, and had his household effects shipped to the post and stored in the warehouse of the depot quartermaster until such time as he could secure quarters for himself. Upon securing such quarters, he was informed that he would have to bear the expense of hauling his goods from the warehouse to his residence, situated some distance from the post, and he was consequently compelled to move them at his own expense.

Held, that the officer on change of station was entitled to have his authorized allowance of household effects transported to his new station at public expense, and, if quarters in kind were not available and he was compelled to procure quarters for himself, this included transportation to the quarters thus secured; but his quarters must be selected with a view to public interests rather than according to his own preference, and he was only entitled to have his allowance of personal effects transported at public expense to the nearest point to his post of duty where he could have procured suitable quarters at an expense commensurate with his salary; *held*, therefore, that the officer should be reimbursed in this case to the amount that it would have cost the Government to have transported his effects from the

warehouse of the depot quartermaster to quarters selected within such limits.

(94-233, J. A. G., Feb. 14, 1913.)

TRANSPORTATION: Use of parcel post; appropriation for postage.

The act of August 24, 1912 (37 Stat., 580), under the heading "Incidental expenses, Quartermaster's Department," names "postage" as one of the items for which appropriation is made. The Postmaster General having decided that parcels exceeding 4 pounds in weight can not be sent by the ordinary Government frank, but require parcel-post stamps if transported through the postal service provided for under the parcel-post act of August 24, 1912 (37 Stat., 539), *held*, that the parcel-post act did not broaden the franking privilege to cover the service within the scope of that act, and where it is desired to send packages coming within the operation of the parcel-post act, it will be necessary to purchase parcel-post stamps therefor; *held further*, that the appropriation for postage mentioned in the Army appropriation act of August 24, 1912, under "Incidental expenses, Quartermaster's Department," was intended to cover postage to foreign countries and registration of packages, and that if packages are sent by parcel-post for the Army it will be necessary to purchase the stamps therefor from the appropriation for the transportation of the Army and its supplies.

(22-020, J. A. G., Feb. 7, 1913.)

TRANSPORTATION: Furnishing sleeping-car accommodations to enlisted men.

The Army Regulations provide for second-class transportation and tourist sleeping-car accommodations for enlisted men not noncommissioned officers traveling on trains, but make no provision for them where such second-class transportation and tourist sleeping-car accommodations are not available. The instructions of the Quartermaster General of May 18, 1912, absolutely prohibit the issue of standard sleeping-car accommodations to enlisted men not noncommissioned officers. Five private soldiers were furnished, upon Government transportation request, with standard sleeping-car accommodations in connection with first-class transportation for a journey requiring night travel, no second-class transportation or tourist sleeping-car accommodations being available. *Held*, that an order involving transportation of enlisted men by train is sufficient authority for procuring the usual and most available means of transportation where the class prescribed by the regulation is not obtainable; that it was competent, however, for the Quartermaster General to prohibit the furnishing of standard sleeping-car accommodations to enlisted men, not being noncommissioned officers; and that as the transportation in question was furnished contrary to such instruction of the Quartermaster General, the cost thereof should be charged to the officer responsible for furnishing the same.

(94-240, J. A. G., Feb. 5, 1913.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

ARMY: Burial expenses of officers and soldiers and of civilian employees; retired officer on active duty.

Appropriation is made for the disposition of the remains of officers and soldiers and of civilian employees of the Army for the fiscal year 1913, in the sundry civil act of August 24, 1912 (37 Stat., 440), as follows:

"Disposition of remains of officers, soldiers, and civilian employees, and so forth: For the expense of interment, or of preparation and transportation to their homes or to such national cemeteries as may be designated by proper authority, in the discretion of the Secretary of War, of the remains of officers, including acting assistant surgeons and enlisted men of the Army active list; * * * and in any case where the expenses of burial and shipment of the remains of officers or enlisted men of the Army who died on the active list are borne by individuals, where such expenses would have been lawful claims against the Government, reimbursement to such individuals may be made of the amount allowed by the Government for such services, * * * \$57,500."

A decision of the comptroller was desired as to whether payment was authorized of the expenses of preparing for shipment and cost of transporting from Little Rock, Ark., to the Arlington, Va., National Cemetery for burial, the remains of a retired Army officer who had died while on active duty as recruiting officer at the recruiting office at Little Rock, Ark. He had been assigned to such duty under authority of the act of April 23, 1904 (33 Stat., 264), which provides:

"The Secretary of War may assign retired officers of the Army, with their consent, to active duty in recruiting * * * and such officers while so assigned shall receive the full pay and allowances of their respective grades."

Held, that the expense of preparing and transporting the remains of an officer did not constitute a part of the pay and allowances of said officer's grade, but was in the nature of a gratuity which the Government voluntarily assumed for the benefit of the deceased officer's family or estate; that there was no other appropriation available for the payment of such expense than that contained in the act above cited, which limited payments to cases of deceased officers and soldiers on the active list; that the act of April 23, 1904, authorized the assignment of retired officers to active duty, but did not authorize their restoration to the active list; and that the officer in this case, not being on the active list, payment of the expenses in question was not authorized. 15 Comp. Dec., 230, 235.

(Comp. of the Treas., Feb. 20, 1913.)

COMMUNICATIONS: Telegrams sent to delinquent contractors.

Two telegrams were sent by the Army quartermaster to as many delinquent contractors for furnishing supplies, urging immediate compliance with their contracts, and another to a contractor notify-

ing him that supplies shipped by him under his contract were unfit for use. The telegrams were not sent in reply to any telegram or communication from the contractors, but were sent by the Government agent in the proper and orderly transaction of the business of his office.

Held, that such telegrams were on official business, and payment therefor was authorized if the account was otherwise correct.

(Comp. of the Treas., Jan. 7, 1913.)

COMMUNICATIONS: Telegrams making inquiries as to whether certain persons were wanted as deserters.

Telegrams were sent collect to The Adjutant General of the Army from different sources, inquiring whether certain men named or described were wanted as deserters from the Army, no request having been made for such telegrams. It did not appear whether the men were subsequently delivered up as deserters or not.

Held, that Army Regulation 121 of 1910 was made in pursuance of a statute authorizing the offering of rewards for the apprehension and delivery of deserters from the Army, and provides that the reward "will be in full satisfaction of all expenses for arresting, keeping, and delivering the deserter or other escaped military prisoner," and that the reward should include the cost of these telegrams, which should have been paid for by the persons sending them and receiving the rewards. The telegraph company should be informed that it must look to the respective senders for payment.

(Comp. of the Treas., Feb. 3, 1913.)

CONTRACTS: Construction of; damages for failure to make delivery within a specified time.

A Government contract for the purchase of oats during the fiscal year 1912 provided for the delivery of said oats during various periods and at different prices for said periods as follows: For oats delivered and accepted during the months of October, November, and December, at the rate of \$1.53 per hundredweight; for deliveries during January, February, and March, 1912, at the rate of \$1.61 per hundredweight; and for deliveries during April, May, and June, 1912, at the rate of \$1.67 per hundredweight. Provision was also made for increasing or diminishing the quantities mentioned in the contract not to exceed 20 per cent at the option of the United States "at any time during the continuance" of the contract. On March 18, 1912, when the full contract quantity had been ordered, and, so far as appeared, had been delivered, the contractor was advised by the Government that it would exercise its option of ordering the increased quantity of 20 per cent; and on the next day he was called upon to furnish such additional amount, the same to be delivered on or before March 31, 1912, at \$1.61 per hundredweight, as provided for deliveries made and accepted during that month. The amount called for was delivered and accepted some days after March 31, 1912. Payment at the rate specified for deliveries during that month was accepted by the contractor under protest, and he presented a

claim for the difference between the price paid and the price fixed for deliveries after March 31, 1912, amounting to \$252.48. The Government under the contract had a right, had the order of March 19, 1912, been given within sufficient time to allow delivery by the end of that month, to cancel the order upon failure of the contractor to make such delivery and to purchase a like quantity of oats in open market, charging the contractor with the difference between the contract price and the price which the Government would have been compelled to pay in excess thereof.

On appeal from the action of the Auditor for the War Department disallowing the claim: *Held*, that the parties to the contract having provided a remedy and a measure of damages in case of failure of the contractor to make deliveries within the time specified, to wit, the purchase by the Government in open market of oats of the quantity and kind demanded under the contract, charging the contractor with the difference in price if in excess of the contract price, and the Government not having exercised its right, but having accepted delivery within the period for which payments should have been made at the rate of \$1.67 per hundredweight, the oats so delivered must be paid for at that rate, as provided in the contract. The claim was therefore allowed.

(Comp. of the Treas., Feb. 17, 1912.)

GOVERNMENT AGENCIES: Stoppage of soldier's pay to reimburse a post exchange for overpayment in cashing his final statements.

A man enlisted at Jefferson Barracks, Mo., August 27, 1909, and was discharged August 26, 1912, at Fort Rosecrans, Cal. by expiration of enlistment. His final statements on discharge were cashed by the post exchange at Fort Rosecrans upon the basis that he was entitled to mileage from the place of enlistment to the place of discharge at the rate of 4 cents per mile, whereas the soldier having been discharged after the passage of the Army appropriation act of August 24, 1912 (37 Stat., 576), was entitled to mileage only at the rate of 2 cents per mile for such travel, having elected to receive such mileage instead of transportation in kind and subsistence. He was thus overpaid by the post exchange on his final statements the sum of \$43.07, and having since reenlisted the amount was collected from him on the pay roll of his company and deposited to the credit of the United States, with the evident purpose of reimbursing the post exchange. The cashing of the final statements by the post exchange was purely a matter of accommodation to the soldier.

On claim by the soldier for reimbursement: *Held*, that the post exchange was not a voluntary association, but an institution established by the Government for the use and discipline of the enlisted men, and that the collection from the soldier was properly made.

(Comp. of the Treas., Feb. 8, 1913.)

PRIVATE PROPERTY: Loss of horse belonging to an Army officer while in the service; act of March 3, 1885.

The act of March 3, 1885 (23 Stat., 350), provides: "That the proper accounting officers of the Treasury be, and they are hereby, authorized and directed to examine into, ascertain, and determine

the value of the private property belonging to officers and enlisted men in the military service of the United States which has been, or may hereafter be, lost or destroyed in the military service," under certain conditions stated.

Certain provisos were added, among them the following:

"*Provided*, That any claim which shall be presented and acted on under authority of this act shall be held as finally determined and shall never thereafter be reopened or considered * * *: *And provided further*, That the liability of the Government under this act shall be limited to such articles of personal property as the Secretary of War, in his discretion, shall decide to be reasonable, useful, necessary, and proper for such officer and soldier while in quarters, engaged in the public service, in the line of duty."

A captain of the Army claimed under said act reimbursement in the sum of \$450, alleged value of a horse owned by him which had died of pneumonia contracted on shipboard while being transported to the officer's station in Cuba, the officer then being in the service of the United States. The Auditor for the War Department disallowed the claim on the ground that the horse had died of a disease not necessarily incident to or peculiar to the military service. The Assistant Comptroller dismissed the appeal from this decision for the specific reason that a horse is not an article of property belonging to an officer or an enlisted man in the military service within the purview of said act of Congress. The Secretary of War had certified that the horse was useful, necessary, and proper for this officer while in quarters, engaged in the public service in line of duty.

On reconsideration of the appeal: *Held*, that the term "article of personal property" mentioned in the proviso above quoted includes a horse, which therefore comes within the provisions of said act of Congress, and reimbursement may be made of the value of a horse lost in the service, if the case otherwise comes within the provisions of said act. The appeal was therefore reopened, and the claim having been found to come within the requirements of law, the same was allowed, reversing the decision of the Assistant Comptroller in the same case in 18 Comp. Dec. 47, of July 24, 1911.

(Comp. of the Treas., Feb. 19, 1913.)

QUARTERS: Right to, while stationed at the home port of a transport on which he performed temporary service.

An officer of the Army was assigned to duty in the Army Transport Service with station at the home port of a transport, and actually took station at such port, and was assigned to duty as transport quartermaster for a particular voyage involving temporary absence from his station. On his return he was to resume duty at the home port unless otherwise ordered. *Held*, that the officer came within the operation of that part of paragraph 1325 of the Army Regulations of 1910 which reads:

"An officer does not lose his right to quarters or commutation at his permanent station by a temporary absence on duty."

(19 Comp. Dec., 94, Aug. 19, 1912.)

QUARTERS: Right of veterinarians to, while temporarily absent from their stations.

A veterinarian, United States Army, was ordered to proceed in company with a commissioned officer to various points, as might be necessary, for the purpose of inspecting horses for the Army, upon completion of which duty he was to return to his proper station. He was absent on such duty from March 26 to May 23, 1909, upon which latter date he returned to his station.

The act of February 2, 1901 (31 Stat., 753), provides that veterinarians "shall receive the pay and allowances of second lieutenant, mounted," and the act of May 11, 1908 (35 Stat., 113), appropriates for commutation of quarters to commissioned officers of the Army without troops at stations where there are no public quarters.

Held, that an Army veterinarian, on temporary duty without troops at stations where public quarters were not available, was entitled to the same commutation of quarters as a second lieutenant of the Army under like conditions; and *held further*, that he was entitled to be paid said commutation from the same appropriation as that from which commissioned officers are paid such commutation, reversing on this proposition 15 Comp. Dec., 822 and 18 id., 937.

(19 Comp. Dec., 341, Dec. 9, 1912.)

TRAVEL ALLOWANCES: On discharge; computing distance for the purpose of furnishing transportation and subsistence.

The act of August 24, 1912 (37 Stat., 576), provides for the furnishing to a soldier on discharge, except by way of punishment for an offense, transportation in kind and subsistence from place of discharge to place of enlistment or to such place "within the continental limits of the United States as he may select, to which the distance is no greater than from the place of discharge to place of enlistment." The act does not except sea travel in computing the distance from place of discharge to place of enlistment for the purpose of furnishing transportation in kind and subsistence, but does specifically except such travel in computing said distance for the purpose of paying mileage on discharge where the soldier elects to receive mileage.

Held, that a soldier enlisting in the Philippine Islands and discharged in the United States, not by way of punishment for an offense, may be furnished transportation in kind and subsistence to any place within the continental limits of the United States which he may select, such distance being less than that from place of discharge to place of enlistment computed by including sea travel.

(Comp. of the Treas., Feb. 28, 1913.)

TRAVELING EXPENSES: Payment of; to civilian employee on termination of journey.

A clerk was transferred, under orders, from the office of the depot quartermaster, Washington, D. C., to duty with the depot quartermaster at Omaha, Nebr., at an increased compensation effective on

the date when he should assume duty at Omaha. He arrived at Omaha at 11.15 p. m., and reported for duty to the depot quartermaster at said place the next morning. His expenses for lodging on the night of his arrival, and breakfast the next morning, amounting to \$1.75, were disallowed by the Auditor for the War Department in the account of the disbursing officer making the payment. *Held*, on appeal to the Comptroller, that the clerk having been ordered to change station from Washington to Omaha, the latter became his new and permanent official station; that his travel upon official business ceased upon his arrival at his new station; and that he ceased to be entitled to lodging and subsistence as a part of his actual expenses of travel upon such arrival. The auditor's action was, therefore, affirmed.

(Comp. of the Treas., Feb. 27, 1913.)

TRANSPORTATION: Through-party rate.

Transportation was furnished for 50 men from Columbus, Ohio, to Fort Sill, Okla., on a single ticket issued in pursuance of a transportation request. A notation on the back of the request read:

"Settlement at special rate as per agreement * * * between the quartermaster, Columbus Barracks, Ohio, and the Baltimore & Ohio Southwestern Railroad Co."

Said agreement provided for the transportation of 50 men, more or less, from Columbus, Ohio, to Fort Sill, Okla., at a rate of \$21.71, first class net per capita, unless the said rate should subsequently be found to be in excess of the regular tariff rates less land-grant or other lawful deductions to which the Government was entitled, in which case the lower rate should govern. The legally authorized rate for the distance under consideration available to the general public and to the Government was \$23.15, chargeable to any party of 50 persons traveling together on one ticket as this party was traveling. The land-grant deduction, to which the Government was entitled, reduced this rate to \$19.79 for each man.

Held, that the net rate available to the Government, computed by taking the authorized land-grant from the regular tariff rate, being less than the specific rate named in the special contract, such net rate is the one required both by law and by the contract, and settlement should be made accordingly.

(Comp. of the Treas., Feb. 25, 1913.)

DECISIONS OF THE COURT OF CLAIMS.

(Digests prepared in the office of the Judge Advocate General.)

CONTRACTS: Liquidated damages; set-off against prior overpayment.

A contract was entered into for the construction of a vessel for the War Department, which contained a provision for the payment of \$50 per day as liquidated damages for every day of delay beyond the contract time for completion of the vessel, exclusive of Sundays and legal holidays. At the request of the contractor, the Quar-

termaster General of the Army verbally waived the time limit, and afterwards confirmed the verbal waiver by letter. The contractor delayed completion of the vessel for 95 days after the time fixed by the contract exclusive of Sundays and legal holidays, but payment was made in full without reduction for such delay. Subsequently the same contractors completed another contract for the construction of a vessel for the United States, and in making payment therefor the Government officials withheld an amount sufficient to cover the liquidated damages arising under the first contract at the rate specified therein. It was not shown that the Government suffered any actual pecuniary damage by the delay in completing the first contract.

Held, that the waiver of the time for the completion of the first contract was not a waiver of the right of the Government to claim liquidated damages for such delay, the Government not being responsible for the delay and the waiver not fixing any new date from which to compute the liquidated damages; and *held further*, that the amount of such liquidated damages might be deducted in making settlement for the work done under the last contract. *Wisconsin Central Railroad Co. v. United States* (164 U. S., 190, 212), and other cases cited.

(*Maryland Steel Co. v. United States*, Ct. Cls., No. 31281, Dec. 2, 1912.)

GOVERNMENT AGENCIES: Responsibility of an officer of the Marine Corps for post exchange funds under his control.

An officer of the Marine Corps was duly designated as post exchange disbursing officer, and came into possession of moneys in said capacity under proper orders pursuant to Navy Regulations. The Navy Regulations at the time provided for the establishment of post exchanges, the method of conducting the same and their sources of income, the manner of keeping accounts, etc. A board of officers appointed to audit the post exchange officer's accounts reported that a shortage existed, but that in their opinion the same "did not result from any carelessness, neglect, or misappropriation" on the part of such officer. The findings of the board were immediately disapproved by the commanding officer. A second board, convened for the purpose of investigating the alleged theft of funds from the post exchange officer, reported that it was unable to obtain evidence fixing the guilt upon any person or persons. This report was likewise disapproved by the commanding officer of the post. Thereafter a court of inquiry was convened at Washington, D. C., for the purpose of investigating the alleged theft of funds from said officer, and reported that the officer, "as custodian, has failed to show satisfactorily that the money was taken from him through no neglect of his own," and that he "was responsible for the funds of the post exchange, company fund, commissary fund, and bakery fund, to the amount of \$959.08, for which he has failed to satisfactorily account." The officer having died, the board recommended that his decedent be held responsible and the amount deducted from any pay that might be found to be due to the deceased officer, and such amount refunded to said funds. The proceedings, findings, and recommendations were approved by the commanding officer of the Marine Corps, and also by the Secre-

tary of the Navy. The court found that the amount stated "was lost through the fault or negligence of plaintiff's intestate" (the post exchange officer). The deduction was made according to the recommendations of the board, and the administrator of the deceased officer brought an action for the recovery of the amount.

Held, that under the regulations of the Navy Department the post exchange was not a voluntary association, but an institution established by the Government for the convenience of the officers, and more particularly for the discipline of the enlisted men, and the regulations establishing the same conflicted with no law; that the funds received by the post exchange officer in this case, by an act of the United States, came into his keeping, not as a private individual, but as a disbursing agent for the Government and for the use and benefit of the marines; and that, inasmuch as it was shown that the officer was at fault and did not properly account for the funds which came into his hands, the plaintiff was not entitled to be relieved from the deduction made from the officer's pay.

(*Woog, administrator, v. United States*, Ct. Cls., No. 29805, Jan. 13, 1913.)

BULLETIN 13.

BULLETIN }
No. 13. }

WAR DEPARTMENT,
WASHINGTON, April 2, 1913.

The following digest of opinions of the Judge Advocate General of the Army for the month of March, 1913, and of certain decisions of the Comptroller of the Treasury, and of an opinion of the Attorney General is published for the information of the service in general.

[2023920, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

APPROPRIATIONS: Contingencies, headquarters of military departments; availability for brigade and Coast Artillery district headquarters.

The Army appropriation act of March 24, 1912 (37 Stat., 570), appropriates as follows:

"Contingencies, headquarters of military departments: For contingent expenses at the headquarters of the several military divisions and departments, including the Staff Corps serving thereat, * * * to be allotted by the Secretary of War, and to be expended in the discretion of the several military division and department commanders, \$7,500."

Under recent regulations promulgated in General Orders, No. 9, War Department, 1913, territorial divisions and departments were superseded by territorial departments, and tactical divisions and brigades were organized.

Held, that the words "headquarters of the several military divisions and departments" could not be construed to include brigade and artillery district headquarters, and that said appropriation was therefore not available for allotment to brigade or artillery district headquarters.

(5-214, J. A. G., Mar. 22, 1913, and 52-241, Mar. 25, 1913.)

APPROPRIATIONS: Incidental expenses of holding an international rifle-shooting competition.

The Army appropriation act of March 2, 1913 (Public, No. 401, p. 9), appropriates—

"To meet expenses incident to holding an international rifle-shooting competition at Camp Perry, Ohio, in cooperation with the Perry

Victory Centennial Celebration to be held in September, 1913,
* * * \$25,000."

On submission for opinion of certain questions relating to the above appropriation, *held*, that, as it was the common practice to offer cash prizes and medals to be competed for at events of this character, expenditures for said purposes were proper incidental expenses of the competition, and might be paid from the appropriation therefor; that the expenses of the assistant recorder of the national board for promotion of rifle practice for necessary trips between Washington and Camp Perry could not be paid from said appropriation, as more specific provision was made therefor in the same act (p. 20) under the head "National trophy and medals for rifle contests"; and that expenses for the transportation, subsistence, and entertainment of visiting foreign teams while in the United States might be met from said appropriation as incidental expenses thereof, in view of the international character of the competition and the evident purpose to reciprocate for similar favors extended to teams from the United States visiting like competitions abroad. 14 Comp. Dec., 344.

(5-249.7, J. A. G., Mar. 18, 1913.)

BONDS: For the return of property; execution of; seals.

A bond was given by eighteen members of the executive board of an organization intended to secure the return of certain tents and cots loaned by the United States. Objection was made that the persons executing the bond had not affixed their seals. It appeared that the word "seal" was printed after each of the first four signatures to the bond, but that nothing corresponding to a seal appeared after any of the other signatures. The instrument recited that it was "given under our hands and seals."

Held, that in view of the recital in the instrument that it was executed under the hands and seals of the obligors, the persons signing and after whose names no seals appeared must be assumed to have adopted the seal of the first four signing the instrument, and that the printed word "seal" was a sufficient sealing of the bond. *Rockwell v. Capitol Traction Co.* (25 App. Cases D. C., 98).

(12-132, J. A. G., Mar. 26, 1913).

CLERKS AND EMPLOYEES: Classified civil service; filing and service of charges.

Section 6 of the Post Office appropriation act of August 24, 1912, (37 Stat., 555), provides:

"That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required

except in the discretion of the officer making the removal, and copies of charges, notice of hearing, answer, reason for removal, and of the order of removal, shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; * * *"

Two officers in the classified civil service were charged with negligence in connection with the sinking of a Government vessel at the dock by reason of water entering a porthole which had been left open, and it was proposed to take disciplinary action against them. It appeared that the specific acts and omissions which constituted the negligence charged against the officers were stated in writing and given to both officers; that they were furnished with copies of the charges and were allowed a reasonable time for personally answering the same in writing, which they did in full; that no affidavits were filed by the Government in respect to the charges, the facts concerning the sinking of the vessel having been taken cognizance of by the military authorities and reported upon in the performance of their duties; and that the only question was as to the legal inference of negligence to be drawn from the facts stated and admitted. Subsequently an inspector, by order of the Secretary of War, made the usual military investigation, of which the two officers had actual notice, and during which they testified before the inspector.

Held, that the investigation by the inspector was not a trial, as that officer was not a tribunal, and that the requirements of said section of the act of August 24, 1912, regarding the reduction in rank and compensation of classified employees in the civil service, had been fully complied with in said cases; *held further*, that the negligence being established, the proper authority might, for the purpose of guiding his discretion in determining what action should be taken, inform himself of the general efficiency of said officers, but that in case of discharge general inefficiency would not become the real and legal reason for such action.

(16-210, J. A. G., Mar. 12, 1913.)

CONTRACTS: Relief against, where deliveries were discontinued by reason of the removal of troops.

Contracts were entered into for the delivery of hay, straw, and other forage at certain posts within the fiscal year 1913, from time to time as ordered, each contract containing a clause reading as follows:

"If during the period of this contract the troops or garrison be withdrawn in whole or in part from the post or station, or other radical change be made in the service by which the supplies will not be required, the contract shall become inoperative accordingly."

Troops were withdrawn from the posts indicated for concentration at Galveston, Tex., and further deliveries under the contracts were in consequence discontinued. The contract price for the delivery of the forage at the posts contracted for was greater in all cases than the cost of obtaining such material in the open market at Galveston.

Held, that the Government, by discontinuing deliveries under the contracts, had only exercised an indisputable right which the Government officials were not at liberty to disregard, and that nothing could be done to relieve the contractors from the operation of the

plain terms of their contracts, but that where special orders had been given for deliveries and the contractors had begun the work of filling such orders, the same might properly be completed, although the Government might not have immediate use for the forage at the places of delivery and might be compelled to ship it elsewhere for use.
(76-760, J. A. G., Mar. 15, 1913.)

DETACHED SERVICE: Details to the Bureau of Insular Affairs from the line of the Army.

The Army appropriation act of March 2, 1913 (Public, No. 401, p. 3), contains the following provision:

*“Provided, That hereafter, in determining the eligibility, under the provisions of the act of Congress approved August Twenty-fourth, nineteen hundred and twelve, of troop, battery, or company officers for detail as officers of the various staff corps and departments of the Army, except the General Staff Corps, service actually performed by any such officer with troops prior to December fifteenth, nineteen hundred and twelve, as a regimental, battalion, or squadron staff officer, shall be deemed to have been duty with a battery, company, or troop: * * *”*

Held, that the detail of a line officer of company grade as an officer of the Bureau of Insular Affairs was within the purview of the detached service provision contained in the Army appropriation act of March 2, 1913.

(6-124, J. A. G., Mar. 6, 1913.)

DETAILS OF OFFICERS: Educational institutions; detail of more than one to each institution.

On submission of the question as to whether or not, under the laws governing the detail of officers of the Army for duty in connection with military instruction at educational institutions, more than one officer may be detailed for such duty at any one institution,

Held, that only one officer on the active list, or one retired officer entitled to active pay subject to the limitation imposed by the act of March 3, 1909 (35 Stat., 758), might be detailed for such duty at any one institution; but that, in addition to one officer on the active list, or one retired officer entitled to full pay subject to the limitations mentioned, detailed for such duty at an institution, a retired officer, who would be entitled to no compensation from the Government other than his retired pay, might be detailed for duty at the institution, if in the judgment of the President the additional detail was necessary.

(56-314, J. A. G., Mar. 18, 1913.)

DISCIPLINE: Donation of \$5 to enlisted men dishonorably discharged from the service.

The Army appropriation act of August 24, 1912 (37 Stat., 580), appropriates—

“For a donation of five dollars to each dishonorably discharged prisoner upon his release from confinement, under court-martial sentence involving dishonorable discharge.”

The same provision has been made in Army appropriation acts for many years past. Two soldiers of the United States Army were tried by court-martial and each sentenced—

“To be dishonorably discharged the service of the United States, forfeiting all pay and allowances due and to be confined at hard labor at such place as the reviewing authority may direct for ten years.”

The sentences were approved, except that the punishment by confinement was remitted.

Held, that the sentence of a court-martial was not complete until acted upon by the reviewing authority, and that the sentence in these cases when so acted upon amounted merely to dishonorable discharge without involving any term of confinement; but, *held further*, that payment of the \$5 provided for in said appropriation act could be paid to the soldiers in the cases mentioned, although no term of confinement was involved in the sentences, if they had been confined as a result of the charges brought against them and were to be released from such confinement on discharge. C. 2925, Feb. 9, 1897; Jan. 4, 1912; decision of the Secretary of War, par. 4, circ. No. 4, A. G. O., 1897.

(30-824.1 J. A. G., Mar. 11, 1913.)

DISCIPLINE: Power to appoint summary courts.

The first section of the summary court act of June 18, 1898 (30 Stat., 483), empowers “the commanding officer of each garrison, fort, or other place, regiment or corps, detached battalion, or company, or other detachment in the Army, * * * to appoint for such place or command, or in his discretion for each battalion thereof, a summary court to consist of one officer * * *” for the trial of enlisted men for offenses not capital, and provides further that “such summary court may be appointed * * * by superior authority when by him deemed desirable.”

The Second Division was concentrated in the vicinity of Texas City and Galveston, Tex., division headquarters and part of the division being encamped near the former, and the remainder of the division near the latter place. A question was presented as to the power to appoint summary courts for the trial of cases arising within the division but outside of regiments belonging thereto.

Held, that the summary court act of June 18, 1898, authorized the commanding officer of a (a) garrison, fort, or other place, (b) regiment or corps, detached battalion, or company, or other detachment in the Army, to appoint for such place or command, or, in his discretion, for each battalion thereof, a summary court for the trial of enlisted men for offenses not capital; that the warrant of authority was based upon command and was expressed coordinately: First, with reference to the territory controlled by the appointing officer, and, second, with reference to the force thus controlled; and that the warrant of authority to the territorial commander was not in terms exclusive of the authority of organization or detachment commanders, nor was the warrant of authority to organization or detachment commanders in terms exclusive of the authority of the territorial commander.

Held further, that in so far as the regiment to which a battalion normally belongs was concerned, the latter became "detached," within the meaning of the summary court act, when removed from the immediate command of the regimental commander, and remained "detached," so far as the administration of justice through summary courts was concerned, until it again came under the disciplinary control of the regimental commander, even though while so "detached" from the regiment such battalion came under the general command and control of an officer commanding a garrison, fort, or other place.

Held further, that a battalion or squadron of Infantry, Field Artillery, or Cavalry was "detached," within the meaning of the summary court act, when such unit was isolated or removed from the immediate disciplinary control of the commander of the regiment of which it formed a part; that a battalion of engineers or a company of engineer, Coast Artillery, Signal Corps, or sanitary troops was "detached" in the same sense when isolated or removed from the immediate disciplinary control of a superior of the same branch of the service; and that within the meaning of the same act any body of troops was a "detachment in the Army" when designated, pointed out, or separated from other troops in such manner as to make its commander primarily the one to be looked to by superior authority as the officer responsible for the administration of the discipline of the enlisted men composing the same.

Held further, that the commanding officers of such units as an engineer battalion, signal corps company, field hospital, ambulance company, or field bakery, belonging to the Second Division concentrated in Texas, if their respective commands were independent except in so far as they constituted parts of the division, and if their commanders were responsible directly to the division commander for the maintenance of discipline in those commands, were competent to appoint summary courts for the same, subject to the right of the division commander to appoint summary courts for all subordinate organizations and detachments under his command, if by him deemed desirable, and subject also to the right of the detachment commander at Galveston to do likewise in respect of the subordinate organizations and detachments under his command.

Held further, that enlisted men of the Hospital or Quartermaster Corps on duty with the Second Division, who were not organized into units but were attached to a regiment or other unit the commanding officer of which was competent to appoint a summary court for the same, constituted part of the command of the officer commanding the organization to which they were attached and were subject to trial by a summary court appointed by said officer.

(30-730, J. A. G., Mar. 11, 1913.)

The Mounted Service School at Fort Riley, Kans., includes a school for field officers, one for company officers, one for farriers and horse-shoers, and one for bakers and cooks. The personnel of the school consists of the commandant, the school staff, the mounted-service school detachment, and the officers and men detailed for the course of instruction in the several schools, the school staff consisting of all officers, not students, on duty with the school. The administration of the school is intrusted to the commandant, the school being governed by the rules of discipline prescribed for military posts and by

its own special regulations. The military personnel under the general command and control of the commanding officer of the post of Fort Riley, Kans., includes the personnel of the Mounted Service School.

Held, that the commandant of the Mounted Service School at Fort Riley, Kans., was the commander primarily to be looked to by superior authority as the officer responsible for the administration of the discipline of the enlisted men connected with said school; that in the sense of the summary court act the enlisted men under the command and control of the commandant of said school constituted a "detachment in the Army"; and that the commandant was competent to appoint a summary court for the trial of enlisted men belonging to his command, subject to the right of the commanding officer of the post of Fort Riley to appoint such court when by him deemed desirable.

(30-730, J. A. G., Mar. 13, 1913.)

DISCIPLINE: Remission of punishment; reduction in files and subsequent promotions.

An officer of the Army was tried by a general court and sentenced "to be reprimanded by the reviewing authority and be reduced in military rank ten files in the lineal list of second lieutenants of Artillery."

The sentence was approved, the reprimand administered, and the officer reduced in files according to the sentence. The officer was subsequently promoted to captain and the ten officers who gained one file each by reason of the sentence of the court had also been promoted. Application was made for the remission of the sentence reducing the officer in lineal rank.

Held, that the promotion of the officer suffering a reduction in files and the promotion of the ten officers benefiting in lineal rank by such reduction operated to make the punishment no longer a continuous one in the sense that it could be reached by the power of remission or by the power of pardon; and that the case had passed beyond the power of the reviewing authority to remit the punishment.

(68-111.1. J. A. G., Mar. 26, 1913.)

EIGHT HOUR LAW: Work upon two contracts, both within the operation of the law.

The following question was submitted for decision relative to the proper construction to be placed upon the eight-hour law of June 19, 1912 (37 Stat., 137):

"Can a contractor work an employee eight hours in a calendar day upon one contract coming within the provisions of the eight-hour law and then work the same mechanic or employee upon another contract coming within the provisions of the law the same calendar day, whether or no the second contract covers a like or different material, and whether or no the second contract be from one department of the Government or another?"

The Attorney General, in an opinion dated October 3, 1912 (29 Opin., 534), held that "the eight-hour workday restriction of the act

of June 19, 1912, known as the eight-hour law, applies only to work contemplated by the contract," and that, clearly, no penalty under authority of the act could be imposed if a laborer or mechanic should be required or permitted to labor more than eight hours a day upon some other work than that contemplated by the contract.

Held, that the opinion of the Attorney General could not be extended so as to cover the case of a laborer or mechanic working more than eight hours a day upon two separate contracts, both coming within the restrictions of the law, no matter whether they cover like or different materials, or whether made by one department of the Government or by two. The question submitted was, therefore, answered in the negative.

(32-300, J. A. G., Mar. 5, 1913.)

MILITARY RESERVATION: Use of portion of reservation by the Organized Militia of Idaho.

The adjutant general of the State of Idaho requested that a certain portion of a United States military reservation in said State be either set aside for military purposes for the militia of said State or that said militia be granted permission to use such portion of the reservation for such purpose. It appeared that a certain portion of the reservation had been designated by the department as a mobilization camp; that there were no other suitable grounds in the vicinity that could be obtained for the State militia encampment; and that in using the reservation in past years the State had expended a considerable amount in repairing the target range. *Advised*, that in view of the fact that the reservation was not being used for military purposes, and that the use of the portion thereof for the purpose outlined would be of advantage to the United States, it would be proper to grant a revocable license to the State for the purposes stated, with the condition that the buildings and other property of the United States be kept in a thorough state of repair and returned to the Government in as good condition as when received.

(80-816.1, J. A. G., Mar. 5, 1913.)

MILITIA: Reserves; payment, from Federal appropriations, for attendance at maneuvers and camps of instruction.

Upon submission of the following questions concerning reserves of the Organized Militia, viz:

"(a) Where the law of a State provides for such reserves and authorizes their attendance at annual encampments or maneuvers, for the purpose of filling organizations to the prescribed strength, would officers and men of the reserve be entitled to active pay while on said duty?

"(b) Would officers and men of the reserve be entitled to pay if ordered to encampments, maneuvers, etc., for active duty and not attached to any organization, but form separate companies, battalions, etc., organized as prescribed for the active militia under the militia law?"

Held, that the portion of the permanent annual appropriation for the support of the militia which was available for and devoted to paying the militia for attendance at maneuvers and camps of instruction was payable only to the regularly enlisted, organized, and uniformed *active* militia; that militia reservists, even though under State legislation they were subject to orders to attend annual encampments and maneuvers, or were authorized to attend such encampments and maneuvers at the option of the individual concerned, did not constitute part of the *active* militia within the meaning of the Federal legislation making provision for paying the militia for participation in maneuvers and camps of instruction; and that, therefore, the questions submitted should be answered in the negative.

(58-650, J. A. G., Mar. 25, 1913.)

NATIONAL CEMETERIES: Advertisements offering rewards for the arrest of persons defacing monuments.

The appropriation for the Gettysburg National Park contained in the act of August 24, 1912 (37 Stat., 442), covers the expense of "marking the lines of battle with tablets and guns, * * *; preserving the features of the battle field and monuments thereon; * * * and all other expenses incidental to the foregoing."

Upon the question of whether a reward of \$100 could legally be offered and paid for information leading to the arrest of persons who had defaced certain of the monuments on said battle field, *Held*, that the appropriation in question was broad enough to include provision for all reasonable and proper means for the protection and preservation of the monuments on the battle field; that the payment of a reward for information leading to the arrest of persons who had defaced the monuments was a reasonable and proper means of securing such protection; and that there was no objection to the approval of a request to insert advertisements in the newspapers offering to pay a stipulated reward for such information.

(80-015, J. A. G., Mar. 7, 1913.)

PAY AND ALLOWANCES: Forage, use of, issued for authorized mounts in maintaining mounts not authorized.

It was desired to know whether an officer having two authorized mounts and, in addition, one young undersized colt could use the forage issued for his authorized mounts in maintaining all three of his horses, the amount issued being amply sufficient for that purpose.

Held, that forage issued for the maintenance of the authorized number of horses of an officer was not to be taken as an emolument out of which he might make a saving or a profit, and that forage issued and not use in the maintenance of his authorized mounts should be accounted for as public property, and could not be used in maintaining horses not required to be kept by him in the public service.

(72-350, J. A. G., Mar. 12, 1913.)

PUBLIC PROPERTY: Sale of personal property of the United States to an officer of the Navy.

The Secretary of the Navy requested that an officer of the Navy on the retired list be permitted to purchase certain articles of clothing, equipment and material from the War Department.

Held, that the only authority for the sale by the Quartermaster Corps of the articles which the said officer desired was contained in section 1144, Revised Statutes, which authorized the procurement and sale by officers of the Subsistence Department of the Army to officers and enlisted men, of certain articles designated from time to time by the Inspector General, which authority was further recognized by sections 3618 and 3692, Revised Statutes; that said authority extended only to the sale of said articles to officers and enlisted men of the Army and did not embrace authority to make sales to others; and that therefore there was no legal authority for granting the request of the Secretary of the Navy.

(80-135, J. A. G., Mar. 19, 1913.)

RIVERS AND HARBORS: Permission to build wharf and trestle approach thereto in Alaska.

A certain company was given permission to build a wharf and trestle approach thereto on Controller Bay, Alaska, upon condition that the permission should be inoperative if not availed of by December 31, 1910. The time limit was subsequently extended to December 31, 1912, but the settlement of the status of certain coal lands which were to be served by the railway of which the wharf and trestle were to be the terminal, was delayed, which likewise delayed the work upon the wharf and trestle, and a further extension was therefore desired. The previous extension was granted under section 10 of the river and harbor act of March 3, 1899 (30 Stat., 1151). The act of May 14, 1898 (30 Stat., 409), for "extending the homestead laws and providing for right of way for railroads in the District of Alaska," provides that—

"When such railway shall connect with any navigable stream or tide water such company shall have power to construct and maintain necessary piers and wharves for connection with water transportation, subject to the supervision of the Secretary of the Treasury."

Held, that notwithstanding the provisions of the latter act, the Secretary of War still had jurisdiction, under section 10 of the river and harbor act of March 3, 1899, over the erection of wharves in Alaska so far as respects their interference with navigation, although the Secretary of the Treasury might, under said act of May 14, 1898, have supervision over the matter in other respects.

(62-352, J. A. G., Mar. 6, 1913.)

TRANSPORTATION: Furnishing accommodations on Army transports to families of officers and others entitled to transportation thereon.

The act of March 2, 1907 (34 Stat., 1170), reads in part as follows:

"When, in the opinion of the Secretary of War, accommodations are available, transportation may be provided for the officers, en-

listed men, employees, and supplies of the Navy, the Marine Corps, * * * [and] officers of the War Department * * *, while traveling on official business, and without expense to the United States, for the families of those persons herein authorized to be transported * * *."

The Secretary of the Navy requested transportation on a United States Army transport for the father-in-law, mother-in-law, and sister-in-law of a chief electrician in the Navy from San Francisco, Cal., to Honolulu, Hawaii. It appeared that the wife of said chief electrician had died, and that he and his two minor children had made their permanent home with said relatives.

Held, that while the law did not specify who should constitute the family of an officer or enlisted man who might be furnished transportation on an Army transport, or how closely related to the officer or enlisted man they must be in order to constitute such family, the persons for whom it was proposed to furnish transportation having been attached in their family relations to the chief electrician might be considered as members of his family, and that transportation on an Army transport might be furnished them, if they were removing to the station of the chief electrician and to a home such as they had occupied with him before making the change, and were not making the trip merely as a visit.

(94-110, J. A. G., Mar. 11, 1913.)

The question having been submitted as to whether, under the act of March 2, 1907 (34 Stat., 1170), a member of an officer's family who would be allowed to accompany him when traveling on official business would be permitted to join him by a later transport than the one upon which he proceeded to his station, *held*, that, considering the fact that the order under which an officer changes his station often required him to leave on such short notice as not to permit him to take his family with him, a regular member of such officer's family who would have been allowed under the provisions of said act to accompany him might be provided, at a later date, with transportation on an Army transport for the purpose of joining the officer at his new station.

(94-110, J. A. G., Mar. 14, 1913.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the Office of the Judge Advocate General.)

CONTRACTS: Time of completion; delay in approving.

A contract dated June 29, 1911, was entered into for the installation of certain electrical apparatus at an Army post, which provided that the work in said contract—

"shall commence on or before the 30th day of June, 1911, and shall be carried on with reasonable dispatch and be completed on or before the 13th day of November, 1911."

It was further provided that such contract was made "subject to the approval of the Quartermaster General, U. S. Army," but it was not actually approved by that officer until September 21, 1911. By

supplemental agreement the time limit for the completion of the contract was extended to December 13, 1911, with the proviso that any excess in the cost of inspection, or other additional expenses or damages to the United States over what would have been incurred had the work been completed by the date originally fixed for its completion, should be charged to the contractor. The work was actually completed December 13, 1911, and final payment made. The auditor disallowed in the accounts of the disbursing officer making the payment an amount equal to the saving in operation of the new plant over the old from November 13 to December 13, 1911, upon the theory that the contractor was obligated to complete the work by the former date, and that his failure to do so resulted in the damage stated.

Held, that the contract did not become binding until September 21, 1911, when it was approved by the Quartermaster General, and that the contractor was not therefore bound to complete the work by the date stated in the contract, but only to complete the same within a reasonable time after such approval. *Held, further*, that the supplemental contract operated to fix the date by which the work should be completed, which date took the place of the reasonable time for completion to which the contractor would otherwise have been entitled, and that the contractor having completed the work within the time thus fixed was not in default and was not liable for damages for not completing the work by the time originally fixed in the contract.

(Comp. of the Treas., Mar. 26, 1913.)

MILITIA: Pay, transportation, and subsistence of, while attending joint encampments and maneuvers with the Regular Army.

Section 15 of the act of January 21, 1903 (32 Stat., 777), as amended by the act of April 21, 1910 (36 Stat., 329), provides that

"The Secretary of War is authorized to provide for participation by any part of the Organized Militia of any State, Territory, or the District of Columbia, on the request of the governor of a State or Territory, or the commanding-general of the militia of the District of Columbia, in the encampments, maneuvers, and field instruction of any part of the Regular Army, at or near any military post or camp or lake or sea-coast defenses of the United States. In such case the Organized Militia so participating shall receive the same pay, subsistence, and transportation as is provided by law for the officers and men of the Regular Army, * * *."

Said section further provides for such payment to be made out of the annual appropriation authorized by section 1661, Revised Statutes, as amended. The regulations of the Organized Militia published by authority of the Secretary of War provide that in order that members of a militia organization attending a joint encampment or maneuver may receive Federal pay, 65 per cent of the minimum strength of the organization must be present, but that transfers of members may be made from one organization to another in order to bring one or both of such organizations within such standard. Said regulations further provide that in order to participate in Federal pay the members of the Organized Militia attending such encamp-

ment or maneuver must have been enlisted for at least three months prior thereto, or have had an equivalent service in the Army, in the Marine Corps, or in the Organized Militia. No provision was made in the regulations for depriving members of the Organized Militia from receiving transportation and subsistence in connection with said encampments or maneuvers in case they did not come within the requirements for the receipt of Federal pay.

A disallowance had been made in the accounts of a disbursing officer on account of overpayment for subsistence for militia attending the joint encampment at Fort Riley, Kans., on the ground that by actual count, as shown by the Federal pay rolls, the cost of the number of rations for the men participating in said encampment estimated at 25 cents per ration aggregated less than the amount paid for such subsistence. This disallowance had been affirmed by the Comptroller by certificate of difference only, and a reconsideration was asked for by the Secretary of War.

Held, that under the circumstances payment for transportation and subsistence of men belonging to the Organized Militia attending joint encampments or maneuvers with the Regular Army under authority of the Secretary of War might be made, although such men might not come within the requirements which would entitle them to participate in Federal pay, and resort to other evidence than the pay rolls might be had in order to ascertain who were entitled to such transportation and subsistence. The case was therefore reopened in order to allow the disbursing officer to submit evidence showing the number of men for whom transportation and subsistence were paid and who participated in the joint encampment.

(Comp. of the Treas., Feb. 19, 1913.)

PAY ALLOWANCE: Forage allowance to military attachés not owning their own mounts.

Section 1272 of the Revised Statutes provides that—

“Forage shall be allowed to officers only for horses authorized by law, and actually kept by them in service when on duty and at the place where they are on duty.”

Section 8, of the act of June 18, 1878 (20 Stat., 150), provides that—

“Forage in kind may be furnished to the officers of the Army by the Quartermaster's Department, only for horses owned and actually kept by such officers in the performance of their official military duties when on duty with troops in the field or at such military posts west of the Mississippi River, as may be from time to time designated by the Secretary of War, and not otherwise, as follows:”

Then follows a statement of officers of different grades with the number of horses authorized for each.

The act of February 24, 1881 (21 Stat., 347), provides that—

“There shall be no discrimination in the issue of forage against officers serving east of the Mississippi River, provided they are required by law to be mounted, and actually keep and own their animals.”

Vouchers for the purchase of the authorized allowance of forage for horses kept by a military attaché serving abroad were disallowed.

by the Auditor for the War Department on the ground that the horses for which the forage had been purchased were not owned by the officer, but only hired for his temporary use.

Held, on appeal from the Auditor's decision, that the acts of June 18, 1878, and February 24, 1881, did not repeal section 1272, Revised Statutes, but that they merely imposed an additional condition upon officers of the Army serving in this country, requiring that they should not only keep but should actually own their horses used in the performance of their military duties; and that the issue of forage for the authorized mounts of officers serving abroad as military attachés was governed by section 1272, Revised Statutes, which did not impose such additional condition. The action of the auditor was, therefore, overruled. The decisions in 16 Comp. Dec., 128, and 19 Id., 11, were overruled, in so far as they were in conflict with this decision.

(19 Comp. Dec., 460, Jan. 23, 1913.)

QUARTERS: Commutation; occupying a bunk in public quarters of another officer while on temporary duty.

An officer of the Army proceeded under orders to a station, not his regular station, for temporary duty, and while so engaged occupied, by courtesy, a bunk in the public quarters of another officer. At the time of this assignment to temporary duty the officer was entitled to and was receiving commutation of quarters at his permanent station. The assignment was not regarded as a change of station, and the officer was not permitted to have his household effects transported to the place of temporary duty. He did not apply for quarters at the temporary station, nor were any such quarters assigned to him there.

Held, that an officer on temporary duty who did not voluntarily relinquish his right to commutation of quarters at his permanent station, was not deprived thereof by the mere fact that he occupied a bunk, or even a room, in the public quarters of another officer at the temporary station through the courtesy or hospitality of said officer. Commutation of quarters was, therefore, allowed.

(Comp. of the Treas., Mar. 24, 1913.)

TRANSPORTATION: Commodity rates on household goods shipped to Pacific coast points.

On request of the Secretary of War for a decision as to the application of commodity rates on household goods shipped to Pacific coast points per Transcontinental Westbound Tariff, 1-M—

Advised, that as said tariff had been suspended, no decision thereon was in order until the same should be recognized as an effective tariff, and that the tariff now in force governing shipments of the character mentioned appears to be that published in Transcontinental Westbound Tariff, No. 12-D, which became effective July 11, 1912. Said tariff provided for a rate on "household goods, less carloads, taking first-class rate under heading of 'household goods of emigrants' movables' in current classification," the value of each article, to be declared by the shipper, not to exceed a certain amount per one hundred pounds and to be so stated in the bill of lading.

Rule 16 of said tariff provided that the consignor of goods might elect to have a limited liability or a common carrier's liability service, and stipulated that ten per centum higher rate should be charged for the increased liability service.

Advised further, that the commodity rates provided for by said tariff were the lawful and only rates that might be used for the transportation of the household goods indicated between the points for which said commodity rates were published, and that an ordinary shipment on a regular form of Government bill of lading, which provided for shipment at owner's risk, would, therefore, take a lower rate, but if shipped at carrier's risk, the higher rate would apply.

(Comp. of the Treas., Feb. 25, 1913.)

OPINION OF THE ATTORNEY GENERAL

(Digest prepared in the Office of the Judge Advocate General.)

TRANSPORTATION: Use of franking privilege in transporting matter pertaining to official business under the parcel-post law.

The Secretary of the Interior asked to be advised whether his department and its various bureaus and offices were entitled to the benefit of the parcel-post law, and whether they had a right to send by parcel post fourth-class matter not exceeding 11 pounds in weight under penalty envelopes and labels.

The pertinent provisions of the act of August 24, 1912, establishing the parcel-post system are as follows:

"Sec. 8. That hereafter fourth-class mail matter shall embrace all other matter, including farm and factory products, not now embraced by law in either the first, second, or third class, not exceeding eleven pounds in weight, nor greater in size than seventy-two inches in length and girth combined, nor in form or kind likely to injure the person of any postal employee or damage the mail equipment or other mail matter and not of a character perishable within a period reasonably required for transportation and delivery * * *."

"That the rate of postage on fourth-class matter weighing not more than four ounces shall be one cent for each ounce or fraction of an ounce; and on such matter in excess of four ounces in weight the rate shall be by the pound, as hereinafter provided, the postage in all cases to be prepaid by distinctive postage stamps affixed. (37 Stat., 557.)"

Prior to the enactment of the statute creating the penalty privilege the following sections of the Revised Statutes were in force:

"Sec. 3896. Postage on all mail matter must be prepaid by stamps at the time of mailing unless herein otherwise provided for.

"Sec. 3897. All mail matter of the third-class must be prepaid in full in postage stamps at the office of mailing."

The departments were expressly required to purchase said stamps for official use. (Sec. 3915, R. S., as amended Feb. 27, 1877, 19 Stat., 250.) At this time the third class of mail matter included merchandise as well as miscellaneous printed matter.

Section 17 of the act of March 3, 1879 (20 Stat., 359), defined mail matter of the third class to embrace "books, transient newspapers, and

periodicals, circulars, and other matter wholly in print * * *," on which postage was required to be prepaid.

Section 20 of the same act (*id.*, 360), provided:

"That mailable matter of the fourth class shall embrace all matter not embraced in the first, second, or third class, * * *," and limited the weight to not exceeding four pounds for each package except in case of single books weighing in excess of that amount.

The penalty privilege for official business was brought into being by the act of March 3, 1877 (19 Stat., 335), section 5 of which provided in part as follows:

"That it shall be lawful to transmit through the mail, free of postage, any letters, packages, or other matters relating exclusively to the business of the Government of the United States," complying with certain other requirements. Said act was subsequently amended, the last amendment being that of June 26, 1906 (34 Stat., 467).

Held, that there were two sets of enactments, dealing, respectively, with the prepayment of postage and with the penalty privilege, which were adopted and subsequently amended without express reference to each other; that section 5 of the act of March 3, 1877, relating to the penalty privilege indicated no intention on the part of Congress to restrict said privilege to classes of mail matter existing at the time of its enactment and was broad enough to cover any class thereafter established or any change in the weight limit of an existing class; and that the legislation relating to such penalty privilege extended to the use of the parcel-post system established by said act of August 24, 1912. The questions asked were, therefore, answered in the affirmative.

(Op. Atty. Gen., Feb. 28, 1913.)

BULLETIN 17.

**BULLETIN }
No. 17. }**

**WAR DEPARTMENT,
WASHINGTON, May 6, 1913.**

The following digest of opinions of the Judge Advocate General of the Army for the month of April, 1913, and of certain decisions of the Comptroller of the Treasury, opinions of the Attorney General, and decisions of the courts, is published for the information of the service in general.

[2034028, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:
GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ABSENCE: Leave of, to clerks and employees in the executive departments.

Section 7 of the act of March 15, 1898 (30 Stat., 316), requires that the heads of the several executive departments shall exact of all clerks and employees in their respective departments not less than seven hours of labor each day, except on Sundays and public holidays, and further provides as follows:

"The head of any department may grant thirty days' annual leave with pay in any one year to each clerk or employee: *And provided further,* That where some member of the immediate family of a clerk or employee is afflicted with a contagious disease and requires the care and attendance of such employee, or where his or her presence in the department would jeopardize the health of fellow clerks, and in exceptional and meritorious cases, where a clerk or employee is personally ill, and where to limit the annual leave to thirty days in any one calendar year would work peculiar hardship, it may be extended, in the discretion of the head of the department, with pay, not exceeding thirty days in any one case or in any one calendar year."

Certain employees of the office of the Chief of the Quartermaster Corps at Washington, D. C., had been absent from duty on account of illness due to vaccination against smallpox.

Held, that the law permits the granting of thirty days' leave with pay in each calendar year, which is to be exclusive of Sundays and legal holidays, but that said period may be extended not to exceed thirty days on account of personal illness or in other exceptional and

meritorious cases mentioned in the act: *held further*, that the absence in these cases should be charged against the extension of leave on account of sickness, if the cases were found to be meritorious, notwithstanding that protection by vaccination might have been required by the sanitary regulations of the department.

(2-151.1, J. A. G., Apr. 3, 1913.)

ABSENCE: Leave of, to a pay clerk at the United States Military Academy.

Section 1330, Revised Statutes, provides:

"Leave of absence may be granted by the superintendent, under regulations prescribed by the Secretary of War, to the professors, assistant professors, instructors, and other officers of the academy for the entire period of the suspension of the ordinary academic studies without deduction from pay or allowances."

A pay clerk of the Quartermaster Corps was on duty at the Military Academy, and the question arose as to whether he was entitled under said section to leave of absence without deduction of pay or allowances during the period of suspension of ordinary studies at the academy, although his usual duties continued notwithstanding such suspension.

Held, that the expression "other officers" in section 1330, Revised Statutes, was intended to include only officers of the academy of the class previously described, to wit, professors, assistant professors, and instructors; that the pay clerk, although an officer within the meaning of the laws granting leaves of absence with pay to officers of the Army (18 Comp. Dec., 564), was not an officer of this class, and was not entitled to the leave of absence provided in said section; but that the question of his leave was governed by the laws relating to leaves of absence to commissioned officers of the Army generally.

(2-225, J. A. G., Apr. 14, 1913.)

APPROPRIATIONS: Paying for personal services from lump-sum appropriations; construction of amendment of statute.

Section 7 of the general deficiency act of August 26, 1912 (37 Stat., 626), provides as follows:

"No part of any money contained herein or hereafter appropriated in lump sum shall be available for the payment of personal services at a rate of compensation in excess of that paid for the same or similar services during the fiscal year 1912."

Section 4 of the legislative, executive, and judicial appropriation act of March 4, 1913 (Public, No. 427, p. 58), amended said section 7 so as to make the above provision read as quoted except to substitute the words "during the preceding fiscal year" for the words "during the fiscal year 1912," where the latter appeared in said provision.

Certain civilian inspectors in the subsistence department were paid for personal services from the lump-sum appropriation contained in the Army appropriation act passed before the said general deficiency act, and which appropriation was not therefore subject

to its restrictions. Their employment was to be continued during the fiscal year commencing July 1, 1913, and they were to be paid from a similar appropriation contained in the Army appropriation act of March 2, 1913, which latter appropriation would come within the restrictions of the act of August 26, 1912, but the act containing such appropriation was passed before the act amending the one last mentioned. The compensation of said inspectors had been increased during the fiscal year 1913, and an opinion was desired as to whether this increase could be continued for the succeeding fiscal year or whether their compensation should be limited to the rates paid during the fiscal year 1912, as specified in the general deficiency act before amendment.

Held, that the appropriations referred to in the amendatory law were the same as those described in the law which it amended, and that the rates of compensation for personal services paid from lump-sum appropriations coming within the operation of said act were to be governed by the rates paid during the preceding fiscal year. *Held further*, that the pay of these inspectors might be increased during the fiscal year 1913, as the appropriation from which they were then paid was not subject to the restrictions of the act of August 26, 1912, and that they might be paid such increased compensation during the succeeding fiscal year, as the appropriation for such year would come within the operation of the law as amended.

(5-075. J. A. G., Apr. 14, 1913.)

CIVIL SERVICE: Removal of classified employees; superintendent of the Antietam battle field.

The superintendent of the Antietam battle field is provided for by the annual appropriation in the act of August 24, 1912 (37 Stat., 440), of the sum of \$1,500—

“For pay of superintendent of Antietam battle field, said superintendent to perform his duties under the direction of the Quartermaster’s Department and to be selected and appointed by the Secretary of War, at his discretion, the person selected and appointed to this position to be an honorably discharged Union soldier.”

Opinion was desired as to whether or not this position came within the requirements of section 6 of the act of August 24, 1912 (37 Stat., 555), which provides for written charges and hearings before discharge, and the record thereof, as to every “person in the classified civil service of the United States.”

The classified service is defined in Rule 2 of the Civil Service Rules as including—

“All officers and employees in the executive civil service of the United States, heretofore or hereafter appointed or employed, in positions now existing or hereafter to be created, of whatever function or designation, whether compensated by fixed salary or otherwise, except persons employed merely as laborers, and persons whose appointments are subject to confirmation by the Senate.”

Held, that the position of superintendent of the Antietam battle field clearly came within this definition of the classified service, and that there was nothing in the appropriation to take it out of said service, although the provision that the superintendent should be se-

lected and appointed by the Secretary of War "at his discretion" from honorably discharged Union soldiers brought it within the class excepted from examination under the rules. *Held further*, that the requirements of the act of August 24, 1912, relative to the manner of removing persons in the classified service should be observed in this case.

(16-210, J. A. G., Apr. 22, 1913.)

CONTRACTS: Release of contractor from performance.

The Government had a contract for furnishing it with electric power, which contract contained a provision for its renewal at the option of the United States from year to year for 10 years. When the time came for renewal the company which had taken over the original contract at first declined to sign the renewed contract and consented to do so only after instructions had been issued that in case it persisted in such refusal the surety on the bond of the original contractor would be requested to secure compliance. The reasons assigned for such refusal were that the rate at which electric current was then being furnished was below cost to the company, and that the furnishing of such current at said rate would be likely to bring it into conflict with the laws of the State prohibiting the charging of one person or corporation a greater or less rate for electric current than another.

Held, that the Government having acquired valuable rights under the contract as executed, the department could not lawfully release the contracting company from its obligations, if such action would be prejudicial to the interests of the United States (9 Opin. Atty. Gen., 81); that the United States is not within the meaning of the words "any person, firm, or corporation," as used in the State statute against discrimination in charges for services of this character as between private parties; and that contracts with the United States are controlled by the laws of the United States applicable thereto and not by State legislation. *Held*, therefore, that the statutes of the State upon the subject constituted no valid ground upon which relief could be granted in this case. *United States v. Fox* (94 U. S., 315, 321); *Osborn v. United States Bank* (9 Wheat., 738, 867); 15 Comp. Dec., 648.

(76-610, J. A. G., Apr. 3, 1913.)

CONTRACTS: Waiver of defects in goods to be delivered, and acceptance upon condition.

A contract provided for the delivery of oats at an Army post, the same to be "as inspected by the Omaha Grain Exchange in carload lots." The circular to bidders, attached to the contract and made a part thereof, provided that said oats should be "dry to the extent of containing not to exceed 12 per cent of moisture." It did not appear that the rules of the Omaha Grain Exchange provided for a moisture test. Oats were tendered for delivery containing moisture in excess of the requirement of the contract.

Held, that under the terms of the contract the oats tendered were subject to rejection, but that it was competent for the Government to

waive the defect and accept the oats either absolutely or upon condition; *held further*, upon consideration of the evidence, that the oats were accepted upon the condition that there should be a deduction made from the contract price on account of the excess of moisture, and that settlement should be made accordingly.

(76-640, J. A. G., Apr. 15, 1913.)

COURTS-MARTIAL: Expenses of taking depositions for; appropriation chargeable.

The depositions of witnesses residing in Canada were desired for use in court-martial proceedings against two enlisted men, and it was necessary in order to procure the same that the United States consul, who was to take the depositions should incur some expenses in railway fares and hotel bills in going to and returning from the place of residence of the witnesses, as it would be more expensive to summon the witnesses to the place where the consul resided. The Secretary of State indicated his willingness to direct the consul to take the depositions if the War Department would bear the said expenses.

Held, that the expenses of the consul, like the fee of a notary public, were necessary for taking the depositions and were proper charges against the appropriation for expenses of courts-martial, courts of inquiry, etc., contained in the Army appropriation act of August 24, 1912 (37 Stat., 575).

(30-477.4, J. A. G., Apr. 14, 1913.)

DAMAGES: Unliquidated; not arising out of contract.

A section of a concrete walk being constructed for the Government had been completed by the contractors in the afternoon and protected by a low fence consisting of stakes driven into the ground and a board nailed along the same. The walk had not been accepted by the Government officials. During the night the same was damaged by persons, presumably soldiers, walking over the same before it had hardened sufficiently, doing such damage as to necessitate the replacing of the top coat.

Held, that the contractors were responsible, so far as the United States was concerned, for all damages of the kind mentioned until the walk had been turned over to the Government; *held further*, that the damages being unliquidated and not arising out of contract, the executive officers could not allow reimbursement for the same.

(18-420, J. A. G., Apr. 7, 1913.)

A Government steamer in backing out of her berth in a fog ran into and damaged a wharf belonging to a private corporation. Public requisitions were submitted for approval covering labor and material to be used in the repair of said wharf.

Held, that the damages occasioned by the collision were unliquidated and arose out of tort and not out of contract, and that according to the well settled principle that executive officers have no authority to settle or allow claims for damages of this character, the said damage could not be repaired at Government expense and the requisitions should not be approved.

(18-420, J. A. G., Apr. 16, 1913.)

EIGHT-HOUR LAW: Domestic servants; employees of the Office of Public Buildings and Grounds serving at the White House.

Certain employees of the Office of Public Buildings and Grounds denominated simply as laborers, were called upon to render service for more than eight hours a day on occasions of public receptions and similar functions at the White House, involving duties of special trust and confidence. *Held*, that these employees, though designated as laborers, were, while performing such duties, acting in the capacity of domestic servants, and did not come within the operation of the eight-hour law of August 1, 1892 (27 Stat., 340), limiting the hours of employment of laborers and mechanics to eight hours in any one day.

(32-232, J. A. G., Mar. 10 and Apr. 12, 1913.)

MEDICAL ATTENDANCE: Seamen on Government vessels engaged in inter-island traffic; treatment for chronic disorder; care-taking crew on transports out of commission.

A civilian officer on a Government vessel employed in inter-island commerce in the Philippine Islands was admitted to hospital for an operation for hernia, described as "bilateral, congenital, and in no wise incidental to his service." He signed no shipping articles, but men employed in this service were liable at any time to be ordered to China or Japan, in which case they signed the usual shipping articles.

Held, that men employed upon vessels of the United States engaged in inter-island commerce come within the operation of the rule giving to seamen generally medical care and treatment when they become sick or are injured in the service of their vessels, and that the official in this case was entitled to the benefit of the rule, although he signed no shipping articles providing for such treatment; but, *held further*, that he was not entitled to be treated and cured at the expense of the United States of a chronic disorder which existed at the time he entered the service, but that he might be treated for illness incurred in the service although such chronic disorder might have been the cause of such illness, and although a surgical operation might be the means indicated for restoring him to his otherwise normal condition.

(94-120, J. A. G., Apr. 7, 1913.)

Members of a care-taking crew of four Army transports out of commission and laid up at Newport News, Va., were by order required to comply with the rules and regulations for the Army transport service, so far as applicable, as well as with those governing the duties of the care-taking crew. They signed no shipping articles. *Held*, in the case of one of said employees that he was not entitled to be treated at the expense of the United States for an injury received in the course of his employment as a member of the care-taking crew, as he was not a seaman within the meaning of the rule giving to seamen medical treatment.

(94-124.1, J. A. G., Apr. 16, 1913.)

PUBLIC PROPERTY: Disposal of sewage on a military reservation, valuable for irrigation thereon.

The sewage of a military reservation was needed for use, after purification, in the cultivation of forage crops, gardens, etc., on the reservation. The military authorities recommended that the Government construct its own purification plant, for which part of the funds were already available, and use the sewage for the benefit of the post and reservation. It was shown that the raw sewage was worth \$6 per million gallons, and that the quantity would be from 2,000,000 to 3,000,000 gallons per day. A private company had offered to construct a purification plant and to receive and purify the sewage at its own expense and to save the Government harmless against the pollution of streams or other injuries incident to the use of the sewage, in return for the right to receive all the sewage from the reservation. Another company desired that the disposal of the sewage should be made the subject of public competition.

Held, that this sewage was the property of the United States, and having a positive and considerable value both commercially and for use on the Government reservation, where it appeared to be much needed, the Secretary had, under the circumstances, no authority to dispose of the same to private parties in either of the methods proposed.

(80-132, J. A. G., Apr. 16, 1913.)

RETIRED OFFICER: Assignment of, to active duty as post-exchange officer.

A retired Army officer expressed a desire to be assigned to active duty as post-exchange officer at a post where there were troops serving. The act of April 23, 1904 (33 Stat., 264), provides that—

“The Secretary of War may assign retired officers of the Army, with their consent, to active duty in recruiting, * * * and to staff duties not involving service with troops.”

A post-exchange officer is selected and detailed by the post commander, and as such is under the command and performs duties under the supervision of the same authority.

Held, that the duties of a post-exchange officer are not distinct from those of an officer serving with troops, but are habitually performed by an officer so serving, and that this officer might not lawfully be assigned to the duty in question.

(88-600, J. A. G., Apr. 8, 1913.)

ROADS AND STREETS: Control of, on military reservations; jurisdiction.

A strip of land on a military reservation, over which jurisdiction had been ceded to the United States, had been occupied by an emergency levee. A public highway which had existed as far back as 1846 had occupied for the greater part of its course across the reservation land then occupied by the new levee. The civil authorities desired that a new road be located across the reservation as nearly as possible to the line of the old road, and opened to public travel.

In another case it was desired to know what legal steps were proper to be taken in order to close certain avenues lying within the limits of a city and of a military reservation. There was no public need for these streets, but it was claimed that the city had certain property rights therein for which it might be entitled to compensation in case the avenues were closed.

Held, in the first case, that the cession to the United States of exclusive jurisdiction over a military reservation gave it full control over all public servitudes on the same, including the right to open and close public highways; and that if it was to the interests of the United States the military authorities might decline to open up a new road in the place of the one that formerly existed across the reservation, but which had been occupied by the emergency levee.

Held, in the second case, that the acquisition of the property for fortification purposes, together with the cession of exclusive jurisdiction by the State, might be regarded as authority for closing any public highway within the limits of the reservation if deemed necessary for the purposes for which the property was acquired, and that the streets in question might be closed by the military authorities if thought necessary.

(80-626, J. A. G., Apr. 1 and 12, 1913.)

SUBSISTENCE: Commutation of rations; reimbursement for expenditure in excess of commutation allowance.

Two enlisted men while traveling as a detachment by train were compelled to purchase subsistence on the dining car, and expended for this purpose a sum in excess of \$1.50 per day each, being the commutation allowance to each of two men traveling as a detachment under orders, as specified in subparagraph 6 of paragraph 1245, Army Regulations, 1910. The Army appropriation act of August 24, 1912 (37 Stat., 578), appropriates for the payment—

“Of the regulation allowances of commutation in lieu of rations to * * * enlisted men * * * when traveling on detached duty where it is impracticable to carry rations of any kind.”

Appropriations have been made in the same language in the Army appropriation acts for many years past.

On application for reimbursement for the amount expended in excess of the commutation allowance, *held*, that the regulation allowance of commutation having been made the basis of the appropriation for commutation in lieu of rations, said allowance as it existed at the time the expense was incurred could not be exceeded, and that the amounts paid in excess of such allowance could not be reimbursed.

(72-432, J. A. G., Apr. 17, 1913.)

Held further, that the appropriation for the payment of the regulation allowances of commutation in lieu of rations does not amount to a legislative adoption of the amounts prescribed by the then existing regulations, so as to limit the expenditure which can be made under the appropriation, but that said appropriation is available for the payment of said allowances whatever they may be at the time. The appropriation presupposes that the regulations are operative

as such and subject to change, and is available for any change in the allowance made necessary by a change in the regulation.

(*Idem.*, Apr. 23, 1913.)

TRANSPORTATION: Use of the parcel-post system; insuring transmission of public property.

Section 8 of the act of August 24, 1912 (37 Stat., 558), establishing the parcel-post system, provides among other things that—

“The Postmaster General shall make provision by regulation for the indemnification of shippers, for shipment injured or lost, by insurance or otherwise, and, when desired, for the collection on delivery of the postage and price of the articles shipped, fixing such charges as may be necessary to pay the cost of such additional services.”

Regulations have accordingly been issued by the Post Office Department, providing for giving receipts for insured packages transmitted through the parcel-post system and fixing charges therefor which are to be paid in parcel-post stamps attached to the packages. Said regulations make provision for indemnification in case of loss, but no additional facilities or safeguards are provided for the transportation of insured packages, and they are treated otherwise as ordinary mail matter. Receipts, however, are exacted on delivery.

Held, that as it is not the policy of the Government to insure its property, and as the sending of packages through the parcel-post system and insuring them according to the regulations prescribed, would amount simply to such insurance without obtaining any additional security against loss than a money indemnity, the use of appropriations of the War Department for the purpose of so insuring such packages containing government property would not be authorized.

(94-070, J. A. G., Apr. 23, 1913.)

TRANSPORTATION: Shipments of Government supplies on vessels not of American register.

The act of April 28, 1904 (33 Stat., 518), directs that all supplies for the Army and Navy shall be shipped in vessels of American register “unless the President shall find that the rates of freight charged by said vessels are excessive and unreasonable,” in which case contracts shall be made under the law as it then existed, with the proviso that no greater charge should be made by such vessels for transportation of articles for the United States for the Army and Navy than are made by such vessels for transportation of like goods for private parties.

An American steamer was scheduled to sail from San Francisco to Manila, P. I., on April 12, and the next sailing of an American vessel from said port to Manila would be June 21. Between said dates it was contemplated that there would be large consignments of public stores arriving in San Francisco for shipment to Manila, and it was doubtful whether the transports scheduled for sailing May 5 and June 5 could accommodate all of such property requiring transshipment to Manila during this period. No American vessels were available.

Held, that under the circumstances, and there being no American vessels available, the excess of shipments which could not be sent by the Government transports sailing May 5 and June 5 might properly be sent by vessels of foreign register, in order to avoid holding the shipments at San Francisco for so long a period. C-20928, J. A. G., Jan. 19, 1907.

(94-080, J. A. G., Apr. 18, 1913.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the Office of the Judge Advocate General.)

ACCOUNTING: Loss of original vouchers and abstracts and the substitution of copies.

The accounts of an Army paymaster for the month of May, 1912, were lost while in transit on the S. S. *Brutus* by the sinking of that vessel on the coast of Mindanao, and the officer transmitted his retained and memorandum vouchers certified by him to be true copies of the originals. The memorandum vouchers did not contain the certificate of the payees nor the receipt of the payees where payment had been made in cash. The expenditures consisted almost entirely of payments to officers and enlisted men of the Army upon pay rolls which were paid in cash, and duplicate receipts were therefore not supplied. Paragraph 7 of Treasury Department Circular No. 52 of July 29, 1907, provides:

"7. Unless required by law, vouchers shall not be taken in exact duplicate, triplicate, etc. Only one copy of a voucher, the original, shall contain signed certifications, approvals, and receipts. As many copies, in memorandum form, duly authenticated if desired, may be taken as administrative requirements demand."

Held, that while it would require a great deal of work to make the audit in said case with the evidence at hand, an audit might be made with sufficient accuracy to determine whether the officer was entitled to the credit claimed by him, and credit should be allowed according to the best evidence obtainable.

(Comp. of the Treas., Apr. 14, 1913.)

APPROPRIATIONS: Expenses of an officer of the Army attending the meetings of a prison association; appropriation chargeable.

An officer of the Army stationed at Washington, D. C., was designated by the Secretary of War to attend the meeting of the American Prison Association to be held at Baltimore, Md., during the month of November, 1912, for the purpose of obtaining information relative to prisons and prisoners to be used in connection with the Army. Upon completion of this duty he was to return to his proper station.

Held, that as the officer's journey to and from Baltimore was on Army business, and was made in obedience to the orders of the Secretary of War, his right to reimbursement for expenses must be determined by the mileage laws for the Army, under which he was entitled, for the distance traveled, to 7 cents per mile and no more, payable from the mileage appropriation.

(Comp. of the Treas., Apr. 25, 1913.)

ASSOCIATIONS: Membership dues in International Association of Chiefs of Police.

The Auditor for the War Department disallowed an item of \$5 in the accounts of a disbursing officer, the same being for "annual dues for one year for membership of the Adjutant General in the International Association of Chiefs of Police," on the ground that payment of the same was prohibited by section 8 of the act of June 26, 1912 (37 Stat., 184), which provides:

"No money appropriated by this or any other Act shall be expended for membership fees or dues of any officer or employee of the United States or of the District of Columbia in any society or association or for expenses of attendance of any person at any meeting or convention of members of any society or association, unless such fees, dues, or expenses are authorized to be paid by specific appropriations for such purposes or are provided for in express terms in some general appropriation."

The voucher covering the disbursement in question was paid from the appropriation for "Incidental expenses, Quartermaster's Department, 1913," which does not specifically authorize the payment of membership fees or dues of any officer or employee of the United States in any society or association.

Held, that in view of the specific prohibition contained in said act of June 26, 1912, the payment of a membership fee in the International Association of Chiefs of Police was not authorized and that the disallowance by the auditor should be affirmed.

(Comp. of the Treas., Apr. 9, 1913.)

AVIATION SERVICE: Increase of pay and allowances for.

The Army appropriation act of March 2, 1913 (Public, No. 401, p. 3), provides that—

"The pay and allowances that are now or may hereafter be fixed by law for officers of the Regular Army shall be increased thirty-five per centum for such officers as are now or may hereafter be detailed by the Secretary of War on aviation duty: *Provided*, That this increase of pay and allowances shall be given to such officers only as are actual fliers of heavier than air crafts, and while so detailed: *Provided further*, That not more than thirty officers shall be detailed to the aviation service."

On application for opinion by the Secretary of War, *held*, that the increase of pay provided for in said act applies to the regular pay of an officer of the Army detailed for duty under said provision, including longevity pay, foreign-service pay, additional pay for providing mounts, or any other additional pay, and also commutation of quarters or any other allowance which the officer is entitled to receive in money while so detailed, including mileage for travel under orders; but that the law does not contemplate an increase in any allowance that the officer is entitled to receive in kind only, such as heat and light, medicines and medical attendance, quarters, forage, shelter for mounts, etc.

(Comp. of the Treas., Apr. 8, 1913.)

CONTRACTS: Assignment of; payments under after assignment.

A certain company entered into a contract with the Government to deliver, during the period from July 1 to December 31, 1912, such quantities of fresh potatoes as might be required at Fort Moultrie, S. C., at the rate of 2.35 cents per pound. On July 27, 1912, another company purchased outright the branch house of the contractor at Charleston, S. C., through which the contract had been supplied, including all of the business pertaining to said branch, and thereafter and until October 30, 1912, the assignee company conducted said business under a trade name different from that of the original contractor, and after the last-mentioned date conducted the business under its own name. The assignee continued to receive and fill orders as under the contract with the original contractor, either in the name adopted by it for the business or in its own name, and was paid for deliveries as the "successor" to the original contractor. On December 31, 1912, the assignee in its own name, on request, delivered 10,789 pounds of potatoes as under the contract, and the same were accepted and used. Payment was asked for the same as the successor of the original contractor.

Section 3737, Revised Statutes, provides that—

"No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States."

Held, that the sale by the original contractor of its plant and business at Charleston, S. C., including its interest in existing contracts, did not operate to transfer to the assignee any of the rights or obligations under the contract in question, and that the bills for supplies furnished under the contract should be made out in the name of and payments made to the original contractor.

(Comp. of the Treas., Apr. 16, 1913.)

CONTRACTS: Deduction for delay in delivery; delay in presenting claim.

By contract dated June 13, 1902, a contractor agreed to furnish and deliver on or before August 27, 1902, a certain number of cotton shirts, with a provision for an increase of 20 per cent in the number to be delivered, at the average rate of 1,000 shirts per day, with a deduction from the contract price at certain rates for deliveries under the contract after said last-mentioned date. The contract was not to become effective until approved by the Quartermaster General, which approval was not obtained until July 7, 1902. Deliveries were completed under the contract, including delivery of the 20 per cent increase, on November 17, 1902. Had deliveries been commenced and made at the rate agreed upon, the contract, including the increase in amount, would have been completed September 9, 1902. Deductions were made according to the terms of the contract in making payment for belated deliveries, to which deductions the contractor submitted at the time. Full and final settlement was made December 8, 1902, at which time the contractor, without protest, certified the final voucher to be correct, and accepted payment.

By letter of February 16, 1903, a Member of Congress on behalf of the manufacturers claimed that the deductions were excessive, and the contractor asked that the contentions of the manufacturer be considered as his own, and treated as a claim for a refund of the deductions. On April 1, 1903, the Quartermaster General advised the Member of Congress that the claim could not be allowed. The matter then rested until the filing, about eight years later, of the present claim, which was disallowed by the Comptroller of the Treasury April 1, 1912.

Held, that as the contractor had accepted settlement with a full knowledge of all the facts now presented, consenting to the deduction and certifying to the correctness thereof at the time when all the facts were fresh in his mind, no reason existed for granting a rehearing in the case.

(Comp. of the Treas., Apr. 19, 1913.)

CONTRACTS: Deliveries after time for completion; cost of inspection.

A contract provided for the delivery of a certain number of hats within a given time, and provided further that if deliveries were not completed within the time specified deductions should be made of the cost of inspection thereafter. Upon consideration of the question as to whether deduction should be made for the whole of the inspector's time during the period of delay or only for the time actually employed in inspecting the hats delivered after the time for completion had expired, *held*, that deduction should be made only for the time actually employed by the inspector in making the inspection of hats delivered after the time for the completion of the contract.

(Comp. of the Treas., Apr. 22, 1913.)

CONTRACTS: Time for completion; delay in approving.

A contract dated June 29, 1911, was entered into for the installation of certain electrical apparatus at an Army post which provided that the work in said contract—

"shall commence on or before the 30th day of June, 1911, and shall be carried on with reasonable dispatch and be completed on or before the 13th day of November, 1911."

It was further provided that such contract was made "subject to the approval of the Quartermaster General, United States Army," but the same was not actually approved by that officer until September 21, 1911. By supplemental agreement the time limit for the completion of the contract was extended to December 15, 1911, with the proviso that any excess in the cost of inspection, or other additional expenses or damages to the United States, over what would have been incurred had the work been completed by the date originally fixed for its completion, should be charged to the contractor. The work was actually completed December 13, 1911, and final payment made. The auditor disallowed, in the accounts of the disbursing officer making the payment, an amount equal to the saving in operation of the new plant over the old from November 13 to December 13, 1911, upon the theory that the contractor was obligated to

complete the work by the former date, and that his failure to do so resulted in the damages stated.

Held, that the contract did not become binding until September 21, 1911, when it was approved by the Quartermaster General, and that the contractor was not, therefore, bound to complete the work by the date stated in the contract, but only to complete the same within a reasonable time after such approval. *Held further*, that the supplemental contract operated to fix the date by which the work should be completed, which date took the place of the reasonable time for completion to which the contractor would have otherwise been entitled, and that the contractor having completed the work within the time thus fixed, was not in default, and was not subject to the deductions provided for in the contract for failure to complete by the time specified.

(Comp. of the Treas., Mar. 26, 1913.)

PURCHASE OF SUPPLIES: Executive departments and establishments at Washington, D. C.; General Supply Committee.

The Chief of the Signal Corps, whose office is located at Washington, D. C., was about to purchase certain screws according to a list presented, the price of the same as quoted to the Signal Corps by a private manufacturer being less than the price shown on the general supply schedule of the supply committee for the same or similar articles. It was not disputed but that the screws were articles of miscellaneous supplies within the meaning of the act of June 17, 1910 (36 Stat., 531), providing for purchases of supplies for the executive departments and establishments of the Government in Washington through the medium of the General Supply Committee therein authorized.

Held, that if screws of this character had been advertised and contracted for and scheduled by the Secretary of the Treasury as required by said act, all departments and establishments of the Government in Washington were required to purchase and use exclusively the screws so contracted for and scheduled, and that the Secretary of War might lawfully purchase screws thus contracted for from no other one than the contractor of the supply committee.

(Comp. of the Treas., Apr. 22, 1913.)

PURCHASE OF SUPPLIES: Payment of discounts on bills for gas.

Bills were rendered for gas furnished to the United States subject to a discount of 20 cents per 1,000 feet if paid on or before the 10th of the month. In one case the check given in payment of the monthly bill showed that it was indorsed at the bank before the expiration of the discount period, and in another case the check was drawn on the last day on which discount would be allowed, but the indorsement indicated that it was paid after said date. Both bills were paid without deduction of the discount. The auditor disallowed the amount of the discounts, in the first case because payment was made before the expiration of the discount period, and in the second case because the officer was apparently negligent in not paying the account in time to secure the discount.

Held, on appeal, that the first bill having been paid within the period when discount should have been allowed, the overpayment of the amount of the discount was properly disallowed; and that the second bill not having been paid until after the right to the discount had lapsed, the company furnishing the gas became entitled to the full amount of the bill. The payment was, therefore, legally made, and the accounting officers were not justified in disallowing the amount of the discount.

(Comp. of the Treas., Apr. 3, 1913.)

QUARTERS: Commutation of, on day of relief from duty.

Certain officers on duty at the Army War College at Washington, D. C., were by special orders relieved from duty to take effect July 1, 1912, granted leaves of absence to take effect on being relieved from duty, and directed then to proceed to their proper stations.

Held, that the allowance of commutation of quarters is analogous to allowance of pay, and that the officers in question were entitled to commutation for the day they were relieved from duty.

(Comp. of the Treas., Apr. 16, 1913.)

TRANSPORTATION: Of the Army; Hire of means of transportation for officers engaged upon map work; Appropriation chargeable.

It was contemplated to order an officer of the Coast Artillery Corps to take station for fieldwork in the preparation of maps necessary in the military service in connection with which it would be necessary to perform local travel, both on land and water. A decision was desired from the Comptroller upon the following questions:

(a) Whether, in the case of officers (not receiving pay and allowances as mounted officers) engaged in the performance of duties assigned to them, or required to do local travel such as indicated above, payment may be made from public funds for the hire of necessary and suitable means of local transportation;

(b) Whether payment for such hire is authorized in the case of officers who receive pay and allowances as mounted officers when such local travel is required of them and the same can not properly be accomplished by the use of saddle horses; and also

(c) Whether payment is authorized for the hire of saddle horses, when necessary, for the use of mounted officers on such detached service where it would be an excess of expense to the Government for the transportation, care, and maintenance of the private mounts of those officers in order to have them available at place of duty.

The foregoing questions were framed upon the supposition that mileage was not to be paid for the travel for which the transportation was to be furnished.

Held, that under the provisions of the act of May 11, 1908 (35 Stat., 108), it is the duty of the United States to furnish the necessary mounts and horse equipments to officers below the grade of major entitled to be mounted, and that where it would be impossible or impracticable to provide such mounts, and the exigencies of the service should require the officer to be mounted, horses might be

hired for such purpose, and the appropriation for the transportation of the Army and its supplies could be used in payment for the hiring of the same. The decisions reported in 17 Comp. Dec., 384, and in 19 idem, 65, were overruled in so far as they were in conflict with said decision.

Held further, that if an officer below the grade of major, required to be mounted, and who provides himself with suitable mounts, should be detailed away from his station to a duty requiring him to be mounted, and the War Department should, by reason of the excessive cost of transportation, refuse to transport his mounts to his new place of duty, a mount might be hired for his use, and payment for such hire could be made from the appropriation for the transportation of the Army and its supplies.

(Comp. of the Treas., Apr. 22, 1913.)

An officer of the Army engaged on military map work was authorized to hire a motor cycle for his use, at not to exceed a certain rate per month, and to purchase the gasoline necessary therefor.

Held, That the hire of said motor cycle and the cost of furnishing gasoline therefor, when used in the discharge of the officer's official duties, might be paid for from the appropriation for the transportation of the Army and its supplies.

(Comp. of the Treas., Apr. 15, 1913.)

TRANSPORTATION: Of the Army; Street car fares for a funeral escort furnished on request of a private organization.

On request by the president of a private organization to the commanding officer at Fort Howard, Md., for an escort for a deceased sergeant of the Army, retired, who was a member of said organization, he was informed that no provision was made for the transportation of such an escort; but the latter stated that he would pay the expense of transportation and take up the question of reimbursement later. Eight dollars were expended in car fares for the transportation of said escort. The commanding officers of certain forts had been instructed to furnish funeral escorts without further authority, but this particular fort was not included among the number.

On claim for reimbursement of the amount expended for car fares, *held*, that the correspondence indicated that the military escort was sent from Fort Howard on the understanding that the expense attending its movement would be borne by the commander of the organization requesting it, and that reimbursement for such expenditure was not authorized.

(Comp. of the Treas., Apr. 21, 1913.)

TRAVEL ALLOWANCES: On discharge; transportation over a longer route at less expense than over a shorter one.

The question was submitted by the Secretary of the Navy as to whether a marine, discharged from the service and not electing to receive mileage instead of transportation in kind and subsistence, might be transported to his place of enlistment over a longer route although at less expense than over a more expensive shorter one.

The Army appropriation act of August 24, 1912 (37 Stat., 576), provides that—

“When an enlisted man is discharged from the service, except by way of punishment for an offense, he shall be entitled to transportation in kind and subsistence from the place of his discharge to the place of his enlistment, * * * or, in lieu of such transportation and subsistence, he shall, if he so elects, receive two cents a mile, except for sea travel, from the place of his discharge to the place of his enlistment.”

By law enlisted men of the Marine Corps are entitled to the same pay as enlisted men of the Army.

Held, that if a soldier elects to receive mileage instead of transportation in kind and subsistence, the distance for which mileage is to be paid should be computed over the shortest usually traveled route; but if he is to receive transportation in kind and subsistence, and the cost of furnishing the same over the official or shorter route is greater than over the longer one, it is the legal right and duty of the officer issuing the transportation to issue the same over the longer route.

(Comp. of the Treas., Apr. 11, 1913.)

OPINIONS OF THE ATTORNEY GENERAL.

(Digests prepared in the office of the Judge Advocate General.)

CONTRACTS: Withdrawal of bids before acceptance.

Certain bids for the purchase of copper scrap, located on the Isthmus of Panama, were to be opened and tabulated in Washington, and were then to be referred to the Isthmus for final decision.

Held, that a bidder on a Government contract can not withdraw his bid before a reasonable time is allowed the Government for acceptance after the opening of the bids, and that a delay of seven days before notice of acceptance was not unreasonable as a matter of law.

(30 Opin., 56.)

EIGHT-HOUR LAW: Construction of public buildings.

In the construction of public buildings, where the Government contracts for the furnishing of the materials and labor as well as for the erection of the building but the purchases of the materials are made directly by the contractor or subcontractor,

Held, that the purchases of such materials by the contractor or subcontractor are subject to the exceptions in section 2 of the eight-hour law of June 19, 1912 (37 Stat., 138), and are not subject to the restrictions of said act in regard to the hours of labor for laborers and mechanics engaged on government contracts.

(30 Opin., 133.)

PURCHASE OF SUPPLIES: For the executive departments and establishments in Washington; service outside of Washington.

A large number of contracts had been made by the officers of the Quartermaster Corps for the purchase of supplies in Washington,

D. C., for Army posts therein and in the vicinity, notwithstanding the fact that the same classes of supplies were included in the schedule published by the General Supply Committee for the fiscal year 1913. It was understood that it had been the practice of the Treasury Department to recognize the validity of such contracts where it appeared that the interests of the Government would be promoted thereby.

Section 4 of the act of June 17, 1910 (36 Stat., 531), directs that all supplies of fuel, ice, stationery, and other miscellaneous supplies for the executive departments and other Government establishments in Washington, when the public exigencies do not require the immediate delivery of the article, shall be advertised and contracted for by the Secretary of the Treasury instead of by the several departments or establishments, and that there shall be a general supply committee in lieu of the board provided for by section 3709, Revised Statutes, as amended, whose duty it shall be under the direction of the Secretary of the Treasury to make an annual schedule of required miscellaneous supplies, and to standardize such supplies, etc.

On request for opinion by the Secretary of the Treasury as to the scope of said act, *held*, that although the practice of recognizing the validity of such contracts was not inconsistent with the statute, said contracts were not authorized by said section 4 of the act of June 17, 1910, except in cases where the exceptions mentioned in the law applied.

(Opin. of Solic., Apr. 1, 1913.)

RETIRED OFFICERS: Employment of, as superintendents of Indian Schools.

Section 3679, Revised Statutes, as amended by section 3 of the act of February 27, 1906 (34 Stat., 48), reads as follows:

"No executive department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations, unless such contract or obligation is authorized by law. Nor shall any department or any officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property. * * *"

Upon consideration of the question of whether or not a retired Army officer, receiving upward of \$2,500 per annum, could be employed as superintendent of an Indian school or agency without additional compensation and without contravening the provisions of said section as amended—

Held, that a retired officer, even though receiving upward of \$2,500 per annum, might be employed as superintendent of an Indian school or agency, where no additional compensation is allowed, without contravening the provisions of said section as amended.

Held further, that the words "voluntary service," as employed in the above-mentioned act, were not intended to cover services rendered in an official capacity under regular appointment to an office otherwise permitted by law to be nonsalaried.

(30 Opin., 51.)

DECISIONS OF THE COURTS.

(Digests prepared in the office of the Judge Advocate General.)

CONTRACTS: Liquidated damages; time of completion.

A contract was entered into to furnish all material and labor for the construction of a coal-storing plant to be completed within 12 calendar months from the date of the contract, with a provision for the payment of liquidated damages for delay beyond the period fixed. It contained a provision for additions of certain units to the plant at a specified unit price, it being contemplated at the time that Congress would appropriate more money, and that in such event the plant would be increased by the addition of such units. Congress made the appropriation, and additional units were ordered, amounting to much more than the original work. No provision was made for an extension of the time of completion on account of such additions. Delays were occasioned by the fault of the Government in commencing the work, but the same was carried to completion with reasonable diligence by the contractor.

Held, that where a building owner delays the contractor, the former can not enforce a time-limit stipulation for the completion of the work, but his conduct waives the same, giving the contractor a reasonable time in which to complete the work; that the delay of the Government in providing a site for the commencement of this work prevented the application of the provision for liquidated damages; and that it was evident that the limitation was intended to apply only to the original work, and not to the extensions then unknown to the parties. Judgment was therefore rendered for the amount of the liquidated damages, which had been retained.

(*Smith v. United States*, Ct. of Cls., No. 29849, Mar. 24, 1913.)

ENLISTMENT: Of a minor without consent of his parent or guardian; *habeas corpus* proceedings while held in confinement preparatory to delivery to the military authorities as a deserter.

A minor who enlisted in the Army without the consent of his parent or guardian deserted, was arrested while in desertion, and was being held for delivery to the military authorities. While so held, a writ of *habeas corpus* was sued out by himself and his mother jointly, claiming his release on the ground of minority.

Held, that a minor enlisting without the consent of his parents or guardian becomes a *de jure* soldier, and on his desertion from the service and subsequent arrest, and while being held for delivery to the military authorities for such offense, he is not entitled to be released upon *habeas corpus*, either upon his own application or that of his parent. *Held further*, in this case, that the mother of the soldier, having known of his enlistment for some time and not having taken any steps to have him released from his enlistment, virtually ratified said enlistment, and her application for his discharge after he had deserted from the service and had been arrested for the offense, should for this reason be denied.

(*Ex parte Dunakin*, 202 Fed. Rep., 290.)

INSURRECTION AND MARTIAL LAW.

(Syllabi by the court.)

1. Martial law; Declaration; Power of governor.

The governor of the State of West Virginia has power to declare a state of war in any town, city, district, or county of the State, in the event of an invasion thereof by a hostile military force or an insurrection, rebellion, or riot therein, and, in such case, to place such town, city, district, or county under martial law.

[Ed. note.—For other cases, see Insurrection, Cent. Dig., sec. 5; Dec. Dig., sec. 5.*]

2. State sovereignty; Constitutional guaranties; Habeas corpus.

The constitutional guaranties of subordination of the military to the civil power, trial of citizens for offenses cognizable by the civil courts in such courts only, and maintenance of the writ of *habeas corpus*, are to be read and interpreted so as to harmonize with other provisions of the Constitution authorizing the maintenance of a military organization, and its use by the executive to repel invasion and suppress rebellion and insurrection, and the presumption against intent on the part of the people, in the formulation and adoption of the Constitution, to abolish a generally recognized incident of sovereignty, the power of self-preservation in the State by the use of its military power in cases of invasion, insurrection, and riot.

[Ed. note.—For other cases, see Insurrection, Cent. Dig., sec. 5; Dec. Dig., sec. 5.*]

3. Constitutional law; Declaration; Review by courts.

It is within the exclusive province of the executive and legislative departments of the government to say whether a state of war exists, and neither their declaration thereof, nor executive acts under the same, are reviewable by the courts, while the military occupation continues.

[Ed. note.—For other cases, see Constitutional Law, Cent. Dig., secs. 125-127; Dec. Dig., sec. 68.*]

4. Military commission; Trial of offense.

The authorized application of martial law to territory in a state of war includes the power to appoint a military commission for the trial and punishment of offenses within such territory.

[Ed. note.—For other cases, see Insurrection, Cent. Dig., sec. 5; Dec. Dig., sec. 5.*]

5. Martial law; Power of courts.

Martial law may be instituted, in case of invasion, insurrection, or riot, in a magisterial district of a county, and offenders therein punished by the military commission, notwithstanding the civil courts are open and sitting in other portions of the county.

[Ed. note.—For other cases, see Insurrection, Cent. Dig., sec. 5; Dec. Dig., sec. 5.*]

6. Martial law; Military commission; Offenses.

Acts committed in a short interim between two military occupations of a territory for the suppression of insurrectionary and riotous

uprisings, and such in their general nature as those characterizing the uprising, are punishable by the military commission within the territory and period of the military occupation.

[Ed. note.—For other cases, see *Insurrection*, Cent. Dig., sec. 5; Dec. Dig., sec. 5.*]

Robinson, J., dissenting.

(*State v. Brown*, 77 S. E. Rep., 243, Supreme Court of Appeals of West Virginia.)

NEUTRALITY LAWS: Exportation of arms and munitions of war into American countries where conditions of domestic violence exist.

The joint resolution of March 14, 1912 (37 Stat., 630), provides that, whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to "export," except under such limitations as shall be prescribed by the President, any arms or munitions of war from any place in the United States to such country, until otherwise ordered by the President. *Held*, that the word "export," was limited to a transportation of arms or munitions of war from any place in the United States to "such country;" and hence a charge that the accused, with intent to export munitions of war from the city of El Paso, Tex., to a place in Mexico, in violation of a proclamation by the President pursuant to such resolution, did make a shipment of cartridges, etc., by transporting them on his person from one point to another in the city of El Paso, did not charge a violation of the resolution.

(*United States v. Chavez*, 199 Fed. Rep., 518.)

NOTE.—The above decision was reversed May 5, 1913 (No. 863, October Term, 1912), by the Supreme Court of the United States, which held in effect that the term "to export" as used in said resolution should not be construed in its strict sense, but should be held to include any shipment of the prohibited articles within the limits of the United States with intent to remove them to the foreign country named in the President's proclamation, although such shipment may not reach the country for which it was destined.

NEUTRALITY LAWS: Power of arrest by military authorities without probable cause.

A Mexican alien, identified with the revolution prevailing in his country, came into the United States, and while there was by order of the President arrested and held by the military authorities without trial while an effort was being made to show that he was in the United States for the purpose of violating the neutrality laws. A writ of *habeas corpus* was sued out to secure his release from the custody of the military authorities.

Held, that the military authorities were without power to arrest the petitioner in a summary manner, and hold him in arrest pending an effort to show that he was in the United States for the purpose of violating the laws thereof; that the order directing his arrest was void; and that he was entitled to his discharge.

(*Ex parte Orozco*, 201 Fed. Rep., 106.)

BULLETIN 18.

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WAR DEPARTMENT,
WASHINGTON, June 7, 1913.

The following digest of opinions of the Judge Advocate General of the Army for the month of May, 1913, and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2043902, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL.

H. O. S. HEISTAND,
Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ARMY: Organization of; appointment of officers in the Corps of Engineers:

Section 5 of the act of February 27, 1911 (36 Stat., 957), increased the number of officers in the Corps of Engineers of the United States Army, and provided that vacancies in the grade of second lieutenant therein should thereafter be filled by promotions of cadets from the portion of the Corps of Cadets assigned to the Engineer Corps, and that the remaining vacancies in any fiscal year, after such promotions, should be filled from civil life as in said act provided.

Held, that an officer holding a commission as lieutenant in the infantry of the Army was not eligible to appointment to a vacancy in the grade of second lieutenant in the Engineer Corps remaining after the portion of cadets which had been assigned to the Engineer Corps had been exhausted in filling vacancies, as he was not a civilian.

(6-226, J. A. G., May 12, 1913.)

AVIATION DUTY: Details for; when additional pay begins.

The Army appropriation act of March 2, 1912 (37 Stat., 705), provides that from and after the passage of said act—

“The pay and allowances that are now or may be hereafter fixed by law for officers of the Regular Army shall be increased thirty-five per centum for such officers as are now or may be hereafter detailed by the Secretary of War on aviation duty: *Provided*, That this increase of pay and allowances shall be given to such officers only as are actual flyers of heavier than air craft, and while so detailed.”

Held, that the date of the officer's first flight after being detailed to this duty should be regarded as the date upon which his increase of pay and allowances should commence, and not the date of his reporting for duty; but that after his first flight, the additional pay should not cease if he holds himself in readiness for such duty and if, through no fault of his own, no flight can be made for a limited period.

(72-181, J. A. G., May 5, 1913.)

BURIAL EXPENSES: Of general prisoners; embalming remains for shipment.

On application for opinion as to whether or not any expense was authorized for embalming and preparing for shipment the remains of a deceased general prisoner, *held*, that there was no appropriation under the control of the War Department out of which such expense or charges for shipment to relatives of the remains of a general prisoner, could be paid, and that the ordinary means available at the post for the disposition of remains of deceased prisoners should be availed of.

(80-400, J. A. G., May 22, 1913.)

CLERKS AND EMPLOYEES: In the executive departments; promotions and demotions in the classified civil service.

Section 4 of the legislative, executive, and judicial appropriation act of August 23, 1912 (37 Stat., 413), provides that:

"The Civil Service Commission shall, subject to the approval of the President, establish a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia based upon records kept in each department and independent establishment with such frequency as to make them as nearly as possible records of fact. Such system shall provide a minimum rating of efficiency which must be attained by an employee before he may be promoted; it shall also provide a rating below which no employee may fall without being demoted; it shall further provide for a rating below which no employee may fall without being dismissed for inefficiency. All promotions, demotions, or dismissals shall be governed by provisions of the civil-service rules * * *"

Held, that the provision "all promotions, * * * or dismissals shall be governed by provisions of the civil-service rules," construed with reference to other provisions with which it is associated, was not then operative and would become effective only after the Civil Service Commission had established, with the approval of the President, a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia.

(6-112, J. A. G., May 10, 1913.)

CONTRACTS: Employment of alien labor upon Government work.

A part of the work for the construction of a water system at Schofield Barracks, Hawaii, was let, after advertisement, to a company which sublet the work of constructing the ditch, or a portion

of it, to Japanese laborers. The contract did not contain any restriction against the employment of alien laborers.

Held, that there was no law requiring or permitting a provision in contracts forbidding the employment of alien labor, and in the absence of legislation giving such authority the Secretary of War was without authority to impose such a requirement. Dig. Ops. J. A. G., 1912, p. 373.

(76-712, J. A. G., May 15, 1913.)

CONTRACTS: Bid and acceptance; set-off; considering bids received after hour of opening.

The purchasing commissary at New York City by bid and acceptance agreed with a company to purchase certain amounts of vegetables for the month of May, 1913, but the company failed to make deliveries in pursuance of said bid and acceptance, except for a limited quantity, necessitating the purchase in open market of a quantity of vegetables at advanced prices in order to make up the deficiency. It was desired to set-off the additional cost against an amount due from the Government to the same company under a contract for furnishing meat, vegetables, fruit, etc., to ships of the Navy Department.

Held, that the mere proposal by a bidder and an acceptance by a Government officer did not operate as a contract, as this did not amount to a compliance within section 3744, Revised Statutes, which requires that every contract made by the Secretary of War on behalf of the United States shall be reduced to writing and signed by the parties thereto at the end thereof, and that consequently the difference in cost could not be set off against the amount which might be due said company under its contract with the Navy Department, nor could any action be taken to compensate the Government for the loss.

(76-742, J. A. G., May 25, 1913.)

Two bids were received in response to an advertisement for bids on a Government contract after the hour fixed for opening such bids, both of which appeared by postmarks thereon to have been mailed in sufficient time to have reached the place of opening the bids by the hour appointed for that purpose, although the margin allowed was small.

Held, that these cases might be regarded as coming within the terms of paragraph 547, Army Regulations, 1910, as amended, but that even if it be considered that the time allowed was too short, the facts would warrant a waiver of the regulation and a consideration of the bids along with the others, as it was clear that the bidders could not have been given any unfair advantage by such delay in receiving the bids.

(76-251, J. A. G., May 31, 1913.)

EIGHT-HOUR LAW: Contract to be performed in Alaska; extraordinary emergency and extraordinary conditions.

The Government entered into a preliminary agreement, subject to the approval of the Chief Signal Officer of the Army, for the recon-

struction of a portion of the Washington-Alaska Military Cable and Telegraph System. The specifications called for the delivery of certain wooden poles which were to be set into the ground and each supported by three braces in the form of a tripod, both poles and braces to be furnished and placed in position by the contractor. Payments were to be made as follows:

(a) Upon the delivery of braces at points where poles and tripods are to be set and the acceptance of the same in lots of 2,000 or more, at the rate of 75 cents per brace.

(b) Poles and tripods when set as per specification will be accepted in lots of 500 or more, and when accepted will be paid for at the rate of 75 cents per tripod.

(c) Clearance of right of way will be paid for upon final settlement and completion of the contract, and will be included in the final payment upon acceptance of the entire work of reconstruction.

On application for opinion as to whether or not the provisions of the eight-hour law applied, and as to whether the contract should contain the stipulation required by the act of June 19, 1912 (37 Stat., 137),

Held, that the purchase of braces and their transportation to the places where they were to be set up, fell within the following provision of the second section of the act of June 19, 1912:

"That nothing in this act shall apply to contracts for transportation by land or water * * * or for the purchase of supplies by the Government, whether manufactured to conform to particular specifications or not;" but that the work of placing the poles and braces in position and of clearing the right of way was subject to the provisions both of the act of August 1, 1892 (27 Stat., 340), and the said act of June 19, 1912.

Held further, that the officer in charge of the work was in the best position to judge as to whether or not an extraordinary emergency sufficient to excuse noncompliance with the former act, or extraordinary conditions sufficient to excuse noncompliance with the latter act, existed in any particular case, and his honest and reasonable decision would not likely be reversed.

(32-300, J. A. G., May 17, 1913.)

EIGHT-HOUR LAW: Purchase of supplies; remodeling projectile hoists; water and electric lights; stevedoring.

Section 1 of the act of June 19, 1912 (37 Stat., 137), prescribed that every contract made for or on behalf of the Government involving the employment of laborers or mechanics shall contain a provision that no such laborer or mechanic doing any part of the work contemplated by the contract shall work more than eight hours in any one calendar day, with a provision for exacting a penalty for violation of the act. Section 2 excepts from the general provisions of the law contracts, among others—

"For the purchase of supplies by the Government, whether manufactured to conform to particular specifications or not, or for such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not."

It was desired to purchase new parts for and to remodel a number of projectile hoists installed on the Pacific coast and in the insular possessions so as to adapt them to the longer type of projectile to be furnished by the Ordnance Department, by removing certain carriers therefrom and shipping them to a certain point to be modified by substituting new parts and remodeling old parts.

Held, that there appeared to be no certain point where a projectile hoist is differentiated from like machinery in general, and hence the same might be considered as an article which could be purchased in the open market; *held further*, that the contemplated work comprising the remodeling of certain parts, might be regarded in effect as a purchase of the remodeled article, and that such work fell within the exception of the law the same as the original article.

(32-300. J. A. G., May 2, 1913.)

It was contemplated to enter into contracts for supplying water at certain forts and electric light at an Army post.

Held, that water and electric light were supplies within the meaning of section 2 of the eight-hour law of June 19, 1912 (37 Stat., 137), which excepts, among other things, contracts for the purchase of supplies from the operation of the general provisions of the act, and that such contracts need not contain the eight-hour stipulation.

(76-720, J. A. G., May 9 and 14, 1913.)

An opinion was desired as to whether it was necessary to include in the conditions for bidders for stevedoring, United States Army transports, a reference to the act limiting the daily service of laborers, and whether the same was also necessary in inviting proposals for loading and trimming coal furnished by contractors on board transports.

Held, that contracts of the character mentioned could not be regarded as contracts for transportation within the meaning of that word as used in section 2 of the act of June 19, 1912 (37 Stat., 137), and that said contracts came within the general provisions of said act.

(32-300, J. A. G., May 28, 1913.)

EIGHT-HOUR LAW: Expenditure of money contributed by private parties.

Section 1 of the river and harbor act of March 4, 1913 (37 Stat., 819), authorizes the Secretary of War to use any additional moneys that may be placed at his disposal by the Port of Coos Bay, Oreg., or by any other organization or by individuals for the improvement of the inner harbor of the bay at said place, and section 8 of said act (*idem.*, 827) provides:

"That the Secretary of War is hereby authorized to receive from private parties such funds as may be contributed by them to be expended in connection with funds appropriated by the United States for any authorized work of public improvement of rivers and harbors, whenever such work and expenditure may be considered by the Chief of Engineers as advantageous to the interests of navigation."

Held, that in expending money contributed by the Port of Coos Bay, Oreg., or by other parties, in dredging the inner channels of the

harbor at that place, the work must be prosecuted in compliance with the eight-hour law of August 1, 1892 (27 Stat., 340), as amended by the act of March 3, 1913 (37 Stat., 726).
(32-213.1, J. A. G., May 2, 1913.)

EIGHT-HOUR LAW: Extraordinary emergency; mobilization camp at Galveston, Tex.

On February 21 and 24, 1913, the Second Division of the Army was ordered to mobilize at Galveston, Tex., and it was necessary to make preparations for caring for the troops while stationed in that locality. Some of the troops were en route at the time the officer designated to make these preparations had reached the vicinity of Galveston, and certain classes of work had to be done quickly. This work was contracted for, and consisted of three classes, viz, arranging for water, building latrines, and building bridges. It appeared that the work could not have been completed in time by working the available force of laborers and mechanics only eight hours per day, and they, in fact, performed labor in excess of said limit.

Held, that the situation might be regarded as constituting an occasion of extraordinary emergency or condition within the meaning of the statutes limiting the employment of labor to eight hours per day on Government work, which would justify the employment of laborers and mechanics for more than eight hours per day.

(32-232, J. A. G., May 20, 1913.)

GRATUITY: On death of soldier; to whom payable; estate of deceased.

The act of May 11, 1908 (35 Stat., 108), as amended by the act of March 3, 1909 (35 Stat., 735), provides for the payment of a gratuity equal to six months' pay to the widow of an officer or of an enlisted man dying in the service from wounds or disease not the result of his own misconduct, or "to any other person previously designated by him," and further provides that—

"The Secretary of War shall establish regulations requiring each officer and enlisted man to designate the proper person to whom this amount shall be paid in case of his death."

Held, that the designation of an estate, whether the estate of the designator or the estate of another, is not contemplated by the statute.

(42-140, J. A. G., May 22, 1913.)

GRATUITY: On death of soldier; forfeiture by desertion.

A soldier absented himself without leave June 10, 1912, at Alcatraz Island, Cal., and was apprehended March 12, 1913, and delivered to the military authorities at Jefferson Barracks, Mo. He was admitted to the post hospital at Jefferson Barracks on March 20, 1913, and died in said hospital March 31 following, from a disease supposed to have been incurred during his absence, but not incurred through misconduct.

There was every indication to show that the soldier intended to desert the service, and no steps had been taken by the Government

looking to his restoration to duty. The act of May 11, 1908 (35 Stat., 108), as amended by the act of March 3, 1909 (35 Stat., 735), allows to the widow of a soldier or enlisted man dying in the service of wounds or disease not the result of his own misconduct, or to any other person previously designated by him, an amount equal to six months' pay received by him at the date of his death, subject to certain deductions.

Held, that a soldier deserting the service repudiates his enlistment contract, and can not in that status claim pay or allowances due him under said contract; that the facts in this case justified an administrative finding of desertion; and that by such desertion all right to this benefit was forfeited.

(42-100, J. A. G., May 1, 1913.)

INTOXICATING LIQUORS: Shipment into a State and sale therein contrary to the laws of such State.

The act of March 1, 1913 (37 Stat., 699), known as the Webb law, forbids the shipment into any State of any "spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind" and their sale or use therein, in violation of any law of such State.

The laws of the State of Oklahoma (sec. 4007, Gen. Stat., 1908) make it unlawful to "manufacture, sell, barter, give away, or otherwise furnish," except as provided in said act, "any spirituous, vinous, fermented or malt liquors," or to—

"Manufacture, sell, barter, give away, or otherwise furnish any liquors or compounds of any kind or description whatsoever, whether medicated or not, which contain as much as one-half of one per centum of alcohol, measured by volume, and which is capable of being used as a beverage, except preparations compounded by any licensed pharmacist, the sale of which would not subject him to the payment of the special tax required by the laws of the United States."

Held, that as a post exchange is a recognized agency of the Government, it is not within the province of any State to regulate the sale of any intoxicating liquors therein, but that such sale is governed by section 38 of the act of February 2, 1901 (31 Stat., 758), and that it is the duty of the Secretary of War, regardless of State laws, to determine what liquors are intoxicating within the meaning of said act. *Advised* further, that as a matter of policy no liquor should be permitted to be sold in a post exchange within a prohibition State, the sale of which is forbidden by the laws of such State.

(48-110, J. A. G., May 14, 1913.)

MILITARY RESERVATIONS: Relocation of a right of way for a railroad; power of the Secretary of War.

By act of April 27, 1912 (37 Stat., 92), Congress granted to a railroad company the right to survey, locate, and construct a railway through a military reservation "upon such a line as may be determined and approved by the Secretary of War," and further provided that before said company should be permitted to enter upon

the reservation "a description by metes and bounds of the lands herein authorized to be taken shall be approved by the Secretary of War."

A right of way was surveyed and a description by metes and bounds of the lands proposed to be occupied was approved by the Secretary of War according to the provisions of said act. It afterwards appeared that the lands approved for station purposes and sidings were disadvantageously located for Government purposes.

Held, that the Secretary of War, in approving the location as surveyed and described by metes and bounds, had exhausted his powers and could not subsequently approve a different location without authority of Congress; *held further*, that neither a revocable license nor a lease under the act of July 28, 1892 (27 Stat., 321), could be given for such purposes, as the same necessarily contemplated an occupancy of a permanent nature. 21 Op. Atty. Gen., 537. (80-624, J. A. G., May 1, 1913.)

MILITIA: Of the District of Columbia; residence within the District.

The act of March 1, 1889, for the organization of the Militia of the District of Columbia, provides (25 Stat., 772):

"That every able-bodied male citizen resident within the District of Columbia, of the age of eighteen years and under the age of forty-five years, * * * shall be enrolled in the militia * * *."

The question having arisen as to the meaning of the words "resident therein" as applied to employees of the District of Columbia and of the several Federal departments therein—

Held, that the period of enlistment in the National Guard of the District of Columbia having been fixed by Congress at three years, employees of the District or of the Federal departments therein are eligible to enlistment in the National Guard of the District, so far as residence is concerned, if they actually have their places of abode in the District and intend to remain there indefinitely or for a period of not less than three years from the date of enlistment.

(58-811, J. A. G., May 26, 1913.)

MILITIA: Organization; conformity to that of the Regular Army; line and staff.

Section 3 of the militia act of January 21, 1903 (32 Stat., 775), as amended by section 2 of the act of May 27, 1908 (35 Stat., 399), provides *inter alia* that—

"On and after January 21, 1910, the organization, armament, and discipline of the Organized Militia in the Several States and Territories and the District of Columbia shall be the same as that which is now or may hereafter be prescribed for the Regular Army of the United States, subject in time of peace to such general exceptions as may be authorized by the Secretary of War."

In a report by this office of June 29, 1909 (C. 14148-F), when the requirements of section 1114, Revised Statutes, prescribing brigade and division organizations, were held in abeyance as provided in

said section, it was held that the establishment of higher commands than regiments of the Organized Militia was left to the discretion of the several States, so long as the military commands of and below regiments conformed to the organization of the Regular Army. Since that opinion was rendered, regulations have provided for the organization of the Regular Army into brigades and divisions in time of peace to conform to the war organization prescribed by law.

Held, that section 3 of the act of January 21, 1903, as amended, contemplates that where divisions and brigades are organized in the militia of any State they shall conform to the corresponding organizations in the Regular Army, and that such organizations shall extend to all units of the line and staff, except as otherwise provided by the statute.

(58-210, J. A. G., May 17, 1913.)

MILITIA: Pay of officer in Organized Militia who is also a retired enlisted man of the Regular Army.

A quartermaster sergeant, United States Army, retired, who had accepted a commission in the Organized Militia of a State, desired to know whether he could draw his pay as an officer of the Organized Militia while engaged in field or camp service for instruction, as contemplated by section 14 of the present militia law of January 21, 1903 (32 Stat., 777), and also his retired pay.

Held, that there is no Federal statute or general principle of Federal law which prohibits a retired enlisted man of the Regular Army, who is also a commissioned officer of the Organized Militia of a State, from receiving pay as such commissioned officer in accordance with the provisions of section 14 of the militia law, as well as his pay as a retired enlisted man of the Army.

(88-931, J. A. G., May 20, 1913.)

OFFICIAL RECORDS: Destruction of, at office of a depot quartermaster.

The depot quartermaster at Chicago, Ill., requested that action be taken to dispose of certain records of the Judge Advocate's Department stored at his depot.

The act of February 16, 1889 (25 Stat., 672), as amended by the act of March 2, 1895 (28 Stat., 933), provides for the sale or disposition of files of papers, not of permanent value or historical interest, that have accumulated in any one of the executive departments of the Government or "in the various public buildings under the control of the several executive departments of the Government."

Held, that this makes provision for the disposition of records on file in Washington, but as the quartermaster's department at Chicago is not a part of an executive department within the meaning of the law, the records in this case can not be disposed of in pursuance of said act. There is, therefore, no authority for disposing of these records unless they include records of regimental, garrison, or summary courts, the destruction of which is provided for by the act of March 3, 1877 (19 Stat., 310), and section 4 of the act of June 18, 1898 (30 Stat., 483).

(66-320, J. A. G., May 6, 1913.)

RESPONSIBILITY: Disposition of unserviceable property.

Paragraph 1039, Army Regulations, 1910, provides that china and glass ware belonging to the mess outfit of a military organization changing station shall, on the order of the commanding officer of the post or station, be inspected, and that all such ware which is found to be serviceable shall be turned over to the quartermaster for reissue, and all found to be unserviceable shall, after the authorized allowance of 5 per cent a quarter on account of breakage shall have been deducted, be destroyed and the money value thereof charged against the responsible officer. The report of the survey when approved by the commanding officer shall be final.

An inspection of china and glass ware of a company was ordered only a short time before said organization changed its station, and the same having been found to be serviceable, was turned over to the quartermaster of the post by order of the commanding officer of the post, who approved the survey as required by regulation, although the report thereof was imperfect. Afterwards a board of survey appointed for the purpose found similar property in the hands of the depot quartermaster, supposed to be the same as that which had been turned over to him, unserviceable.

Held, that under the circumstances the survey ordered by the commanding officer and approved by him should be taken as final, and that, if unserviceable property was found in the hands of the depot quartermaster, the same should be disposed of by him in the usual manner and thereupon he should be relieved from further responsibility.

(80-120, J. A. G., May 31, 1913.)

RETIRED OFFICERS: Active duty in certifying to the destruction of worn-out property.

A circular of the Quartermaster's Department required that the certificate of the accountable officer to the destruction of certain worn-out expendable property issued to troops should be supported by the certificate of a disinterested officer to the effect that the property had been destroyed in his presence. A recruiting officer of the Army desired to know whether a retired officer not on active duty could be allowed to make this certificate as the disinterested officer.

Held, that this certificate contemplated the performance of active duty in seeing to the destruction of the property, to which duty a retired officer, not on active duty, could not lawfully be assigned, and therefore such an officer could not make the required certificate.

(88-500. J. A. G., May 17, 1913.)

SERVICES: Gratuitous; accepting gratuitous transportation in relieving flood sufferers.

Several railway companies had participated in the movement of a special train from Washington, D. C., to Cincinnati, Ohio, for the Secretary of War and party in connection with the furnishing of relief to sufferers from the unusual floods in the latter State, and

it was desired to know whether this service, which was rendered gratuitously, could lawfully be accepted as such.

Section 3679, Revised Statutes, as amended by the act of February 27, 1906 (34 Stat., 40), prohibits, among other things, the acceptance of "voluntary service for the Government," but excepts from the prohibition "cases of sudden emergency involving the loss of human life or the destruction of property;" and section 1 of the interstate-commerce act, in prohibiting common carriers from furnishing free passes or free transportation, contains a proviso that the prohibition shall not—

"Be construed to prohibit * * * any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation."

Held, that the gratuitous services of the several railway companies in furnishing transportation to the Secretary of War while assisting in the distribution of Government relief for the flood sufferers, might legally be accepted, as the case came within the exceptions of the two statutes referred to.

(76-030, J. A. G., May 10, 1913.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

CEMETERIES: Marking graves of Confederate dead; appropriation available.

The act of March 9, 1906 (34 Stat., 56), authorizes the Secretary of War to ascertain the location and condition of graves of the soldiers and sailors of the Confederate Army and Navy in the Civil War who died in Federal prisons and military hospitals in the north and who were buried near the places of their confinement, and to cause to be erected white marble headstones over the same. The act of August 24, 1912 (37 Stat., 439), appropriates—

"For continuing the work of furnishing headstones of durable stone or other durable material for unmarked graves of Union and Confederate soldiers, sailors, and marines"—

in national, post or other cemeteries and burial places under the authority of various acts of Congress, including the act of March 9, 1906.

Held, that the Secretary of War under said appropriation was authorized to furnish headstones for unmarked graves of Confederate soldiers buried in national cemeteries as provided in said act of March 9, 1906.

(Comp. of the Treas., May 13, 1913.)

CLERKS AND EMPLOYEES: Extra compensation to; clerk in Quartermaster's Department at large.

A clerk in the Quartermaster's Department at large was in receipt of a compensation of \$1,000 per annum payable from the appropriation for "Incidental expenses, Quartermaster's Department" of the

Army made by the act of August 24, 1912 (37 Stats., 580). His appointment or designation was made by the authority of the Secretary of War and the amount of his compensation determined in the individual case. While so employed he performed extra clerical services for the post laundry by keeping the books, tracing collections, etc. This work was performed outside of his office hours and was not required as a part of his duties as clerk in the Quartermaster's Department. For these extra services it was proposed to pay him \$50 per month from the receipts of the post laundry, which amount was not fixed by any law or regulation.

Held, that not being a clerk in an executive department, he did not come within the prohibition of section 1764, Revised Statutes, forbidding compensation for extra services to a clerk in such department, and not being an officer or other person whose salary or compensation is fixed by law, he did not come within the prohibition of section 1765, Revised Statutes. *Held*, therefore, that there was no legal objection to paying the additional compensation proposed.

(Comp. of the Treas., Apr. 16, 1913.)

CONTRACTS: Delay in approval; delivery after time specified and purchase in open market.

A contract dated September 17, 1912, was made subject to the approval of the commanding general of the Central Division, but was not approved by him until November 5, 1912. The contractors were required by the contract to make deliveries of hay at a military post at such time and in such quantities as the receiving officer might direct at a certain price for October deliveries and at a higher price for November deliveries. Purchases were made in open market at rates higher than the contract price to make up for short deliveries during the month of November, and it was sought to charge the contractors the difference between the price paid and the contract price for deliveries in that month.

Held, that, as the contract did not become effective until approved, the contractors were entitled to be paid for all hay delivered and accepted in November at November prices, although delivered in response to calls intended for and given in time for delivery in October; *held further*, that the contractors could not be considered as in default on any deliveries prior to the approval of the contract, and could not be charged with the difference in cost between the market price which the Government paid and the contract price for any purchases made to cover short deliveries prior to such approval; but that it appeared from the facts submitted that the contractors had had sufficient time after the approval of the contract to make the deliveries called for for November and were chargeable with such difference in cost for shortage in deliveries which should have been made in that month.

(Comp. of the Treas., May 12, 1913.)

PAY OF OFFICERS: Officer in employ of foreign Government under special authority of Congress; awaiting orders.

An officer of the Army was by joint resolution of Congress "permitted to accept" from a foreign Government the position of in-

structor of coast artillery, together with "the emoluments, rights, and privileges pertaining thereto." On submission by the Auditor for the War Department of an original construction of said joint resolution—

Held, that the status of the officer while so employed was more nearly allied to that of an officer on waiting orders than to one on leave of absence, and that section 1265, Revised Statutes, regarding leave of absence was not applicable to the case; *held*, therefore, that the officer while so engaged was entitled to the full pay of his grade instead of his pay as on leave of absence. (See Op. J. A. G., June 15, 1912 (C. 29481).)

(Comp. of the Treas., May 1, 1913.)

PRIVATE PROPERTY: Loss of horse; delay in presenting claim.

The act of March 3, 1885 (23 Stat., 350), directs the accounting officers of the Treasury to examine into and determine the value of private property of officers and enlisted men in the military service lost or destroyed under certain conditions, and provides for the payment of the same, with the proviso that all claims then existing should be presented "within two years and not after" from the passage of said act, and that all such claims thereafter arising should be presented "within two years from the occurrence of the loss or destruction."

An officer's horse was destroyed on March 6, 1911, under conditions claimed to have been such as to entitle him to reimbursement for the loss under said act. The papers relating to this claim were received in the office of the Quartermaster's Department on December 20, 1911, and on the next day were returned to the Adjutant General recommending reference to the commanding general of the Philippine Division, inviting attention to the decision of the Comptroller of the Treasury of July 24, 1911 (18 Comp. Dec., 47), to the effect that the class of private property belonging to officers and enlisted men, to which the act of March 3, 1885, relates, does not include horses belonging to officers in the military service and that the accounting officers of the Treasury had no jurisdiction over such claims. Had it been known in said office that the accounting officers of the Treasury had jurisdiction over claims for horses lost by officers in the military service this claim would have reached the Auditor for the War Department within the two years required by the act. The failure to reach the auditor's office in time occurred through no fault of the officer. The claim did not, in fact, reach the accounting officers until April 9, 1913, or more than two years after the loss had occurred.

Held, that the law requires that all such claims must be filed with the accounting officers within two years from the occurrence of the loss or destruction, and that the filing of the claim in the War Department within such period is not a filing with the accounting officers within the meaning of the act (9 Comp. Dec., 510); *held further*, that in view of the plain provisions of the act the comptroller was not at liberty to consider the reasons why the claim was not presented to the accounting officers within the period named in the statute.

(Comp. of the Treas., May 17, 1913.)

QUARTERS: Commutation of, while awaiting sailing of a steamer; change of orders.

An officer of the Army was relieved from duty at his permanent station in time to permit him to proceed to Seattle, Wash., and there take passage on a steamer going to a post in Alaska to which he had been assigned. After his arrival in Seattle, and on the day before the sailing of the steamer on which he was to take passage, the officer's orders were changed by assigning him to a different station, and he was compelled to remain in Seattle for a period of time awaiting the sailing of another vessel going to his new station.

Held, that the officer acquired no right to quarters or to commutation thereof during the time he was compelled to await the sailing of his steamer to his new station, the delay being regarded as an incident of his travel.

(Comp. of the Treas., May 2, 1913.)

TRANSPORTATION: Release of carrier from liability; Government bill of lading.

A shipment of household goods of an officer changing station was made upon a regular form of Government bill of lading, which is subject to all the conditions and limitations of a uniform or standard bill of railroad companies and takes the same rates provided for shipments therein with the addition that—

"The shipment is at 'owner's risk,' or released rates where the tariff provides lower rates on that account, and at 'company's risk,' where the tariff makes no such provision."

Two rates were provided for the transportation of household goods, one a lower rate where the value of the goods was limited or released to \$10 per hundred pounds, and the other a higher rate where there was no such release, and where the transportation company would be liable for the full value of the property in case of loss. It was claimed that at the time of the shipment a classification was effective which provided that where shippers desired reduced rates based upon agreed values—

"A statement to that effect must be written out or stamped in full upon the bill of lading at time of shipment and the shipper required to accept in writing the value expressed," and that "where shippers do not desire to avail themselves of the reduced ratings based upon agreed value, notation of that effect should be inserted on the bill of lading by the agent at time of shipment."

Held, following the interpretation heretofore placed upon the provisions of the Government bill of lading, that the shipment in question should be regarded as having been made at the reduced rates based upon a release of value and consequent release of liability of the transportation company to value required to secure reduced rates, and that the claim for the difference between the higher and the lower rate should be disallowed.

(Comp. of the Treas., May 21, 1913.)

TRAVELING EXPENSES: Civilian employees; expense of board and lodging at their homes while on temporary duty.

Certain civilian employees on temporary duty presented with their expense accounts subvouchers signed by their wives which included

board and lodging. It was understood that they were living at their homes at the time they were engaged on temporary duty. Under paragraph 744, Army Regulations, 1910, civilian employees in any branch of the military service are entitled to reimbursement of actual expenses when traveling under competent orders for—

“Cost of meals, and lodgings including baths, tips, and laundry work, not to exceed \$4.50 a day while on duty at places designated in the orders for the performance of temporary duty.”

Held, that civilian employees receive this reimbursement on the theory that they continue in a traveling status, and that by presenting vouchers signed by their wives it would appear that they had abandoned this status. The payment of expense accounts of such employees supported by receipts signed by their wives for board and lodging was, therefore, unauthorized.

(Comp. of the Treas., May 17, 1913.)

BULLETIN 23.

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No. 23. }

WAR DEPARTMENT,
WASHINGTON, *July 15, 1913.*

The following digest of opinions of the Judge Advocate General of the Army for the month of June, 1913, and of certain decisions of the Comptroller of the Treasury, and of the courts, and of opinions of the Attorney General, is published for the information of the service in general.

[2054671, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

APPROPRIATIONS: Lump-sum; payment for personal service; transfer from a statutory position.

It was proposed to transfer a clerk in the War Department receiving a statutory compensation of \$1,800 per annum to a position newly created involving the performance of essentially different duties at a compensation of \$3,600 per annum, to be paid from lump-sum appropriations. Section 7 of the general deficiency act of August 26, 1912 (37 Stat., 626), provides:

"Nor shall any person employed at a specific salary be hereafter transferred and hereafter paid from a lump-sum appropriation at a rate of compensation greater than such specific salary."

Held, that the above provision was intended only to prevent the transfer from a position with a specific salary or compensation to another position paid from a lump-sum appropriation at an increased compensation where the duties or services required were the same or similar, but that where the duties are essentially dissimilar such transfer might be made without violating the provisions of said act, and that the proposed transfer might lawfully be made. Decision of Comptroller of the Treasury, June 6, 1913.

(5-075, J. A. G., June 13, 1913.)

Similarly *held*, that a clerk at a specific salary in the Department of Agriculture might be transferred to a position in the War Department at an increased compensation paid from a lump-sum appropriation where the duties to be performed were essentially different.

(5-075, J. A. G., June 13, 1913.)

APPROPRIATIONS: Lump-sum; payment for personal services; increase of compensation by reason of increased efficiency; same or similar services.

It was proposed to increase the pay of a junior engineer in a district engineer's office who was paid from a lump-sum appropriation, on the ground of his long-continued service and consequent increase in proficiency and capacity for work.

Held, that section 7 of the general deficiency act of August 26, 1912 (37 Stat., 626), forbids the increase of compensation for personal services of employees paid from lump-sum appropriations for the performance of the same or similar services beyond the amount paid for such services during the preceding fiscal year, and that increased proficiency arising from experience and length of service does not so differentiate the services as to prevent them from being the same or similar within the meaning of the statute; *held*, therefore, that the proposed increase could not be made.

(5-075, J. A. G., June 20, 1913.)

It was proposed to increase the compensation of an employee in the engineer service at large from July 1, 1913, payable from a lump-sum appropriation, without changing the character of his service, the increased compensation not to exceed the amount paid by the United States Reclamation Service for the same or similar service, during the preceding fiscal year.

Held, that the act forbidding the increase of compensation of employees paid from lump-sum appropriations to a greater rate than that paid for the same or similar services during the preceding fiscal year contemplated services rendered under the same or similar conditions and at the same or like places, and that an employee could not be continuously promoted until his pay reached the highest rate paid to any one rendering the same or similar services in any branch of the Government service; *held*, therefore, that the employee could not be paid at a greater rate of compensation than that which he had received for the same or similar services during the next preceding fiscal year.

(5-075, J. A. G., June 27, 1913.)

APPROPRIATIONS: Setting aside a certain portion of a general appropriation for a particular purpose; availability of the surplus.

The general appropriation for "roads, walks, wharves, and drainage" for the fiscal year 1913 in the act of August 24, 1912, contains the proviso (37 Stat., 584)—

"That thirty thousand dollars of the amount herein appropriated, or so much thereof as may be necessary, may be used for draining and filling swamps within the Government reservation on Constitution Island, United States Military Academy, West Point, New York."

Only \$29,000 of this amount was found necessary for the purpose, and the question arose as to whether or not the remaining \$1,000 could be used for the general purposes of the appropriation.

Held, that while the effect of a provision of this character, if unqualified, was to set aside from the appropriation the amount named for the specific purpose, in which case no portion of such amount could be used for any other purpose, yet as the language in this case

was qualified by the clause "or so much thereof as may be necessary," the effect was to set aside only so much from the general appropriation as might be needed for the specific purpose, leaving the balance available for the other purposes of the appropriation.

(5-249.2, J. A. G., June 3, 1913.)

BONDS: Justification and sufficiency of sureties on bidder's guarantees and contractors' bonds; duplicate certificates.

The Chief of the Quartermaster Corps submitted the question as to whether a certificate of the clerk of a United States court as to the sufficiency of sureties on bidders' guaranties and contractors' bonds was required to be placed on more than one of the instruments where the contracts are required to be executed in triplicate, or whether it would be sufficient if the certificate should be attached to one number with a reference thereto on the others.

Held, that the affidavit of justification and certificate of sufficiency of sureties to a contractor's guaranty or bond are no part of the instrument (Dig. J. A. G., 1912, p. 195), and that there was no legal objection to requiring the certificate to be placed only upon one number of the guaranty or bond, reference being made thereto on the other numbers.

(12-311, J. A. G., June 5, 1913.)

CONTRACTS: Opening of bids; accepting a proposal after the time fixed for receipt of same.

A contract was to be let for remodeling a building, and the time for opening proposals therefor was fixed at 11 a. m. The lowest bid was received 7 minutes after the time fixed for opening, but 13 minutes before the bids were actually opened. It was not claimed, nor did it appear, that the lowest bidder derived any advantage from the delay in submitting his bid.

Held, that under these circumstances the lowest bid might be received and the contract awarded to the lowest bidder, the case being one where the strict requirements of the regulations might be waived.

(76-251, J. A. G., June 12, 1913.)

DISCIPLINE: Prisoner awaiting trial; punishment.

An enlisted man of the Army under confinement awaiting trial was subjected to solitary confinement on bread and water for refusal to work, by order of the post commander, who was of opinion that discipline demanded immediate action, and that his action was justified by the Manual of Guard Duty. Paragraph 343 of said manual prescribes that:

"A general prisoner who refuses to work may, for his first offense, be closely confined and deprived of his next meal, but food will be allowed him as soon as he consents to resume work."

Paragraph 358 of the same manual provides that:

"The foregoing rules will be enforced with reference to garrison prisoners so far as applicable."

Held, that said paragraphs of the Manual of Guard Duty had no application to an enlisted man held awaiting trial, as he was not a garrison or a general prisoner, nor was he being punished.

Held further, that an enlisted man awaiting trial should not be punished for refusal to perform duty except as any other enlisted man not serving sentence might be so punished, and that, except in extreme cases where the necessities of discipline required immediate action, the post commander would not be authorized to resort to summary punishment, but should avail himself of the orderly procedure prescribed for maintaining discipline.

(30-133, J. A. G., June 9, 1913.)

FORAGE: Allowance for mount of an officer on leave of absence.

A first lieutenant of the Philippine Scouts desired to have forage issued for his authorized private mount while he was away from his permanent station on leave of absence, and an opinion was asked as to whether the same might lawfully be issued in view of the decision of the Comptroller of the Treasury of January 17, 1913 (19 Comp. Dec., 453), digested in W. D. Bul. No. 4, p. 16, current series. Said opinion related to an officer of the Medical Reserve Corps who had been granted a leave of absence and ordered to his home to be relieved from active duty upon the expiration of such leave, and who claimed forage for his private authorized mount kept by him at his home.

Held, that it was not apparent that the Comptroller of the Treasury had overruled the long-established practice of allowing officers on leave of absence but not detached from their stations forage for their private mounts owned and kept by them at the station to which they were attached.

Held further, that within the meaning of the statute relating to the issue of forage for private authorized mounts of officers, an officer on leave of absence was still to be regarded as on duty at the station to which he was attached, and that forage might be issued for his authorized mount during his absence on such leave. The concluding portion of the digest of the Comptroller's decision was perhaps stated too broadly, and should have contained the qualification that the mount for which forage was claimed was one kept by the officer at his home and elsewhere than at the station to which he had been attached for duty.

(72-143, J. A. G., June 25, 1913.)

MILITIA: Officers attending Field Service School for Medical Officers; quarters and commutation thereof.

Certain officers of the Organized Militia attended the Field Service School for Medical Officers at Leavenworth, Kans., from April 1 to May 23, 1913, in pursuance of authority contained in section 16 of the militia law of January 21, 1903, as amended by section 10 of the act of May 27, 1908 (35 Stat., 402), which provides that whenever an officer of the Organized Militia shall, under certain conditions recited, attend and pursue a regular course of study at any military school or

college of the United States such officer "shall receive from the annual appropriation for the support of the Army, the same travel allowances and quarters or commutation of quarters to which an officer * * * of the Regular Army would be entitled for attending such school or college under orders from proper military authority."

Upon arrival at the school these officers were assigned to and occupied public quarters, but afterwards of their own volition moved out of them and provided their own quarters, apparently believing that they were entitled either to commutation of quarters or quarters in kind as they might elect.

Section 16 of General Orders No. 128, W. D., 1911, provided with reference to officers of the militia attending such schools that "militia officers can not be furnished with quarters in kind," and paragraph 341 of the Regulations of the War Department for the Government of the Organized Militia contains substantially the same provision.

Held, that there is no authority for the rule that militia officers so circumstanced can not be furnished quarters in kind, and that these officers, having been furnished quarters in kind, were not entitled to commutation thereof, as an Army officer similarly situated would not have been entitled to such commutation.

(58-411.1, J. A. G., June 7, 1913.)

MILITIA: Rental of rifle ranges purchased for, to the United States and to private parties; disposition of proceeds.

On submission of the question for opinion as to the right of a state to charge the United States a rental for the use of a rifle range purchased for the use of its Organized Militia, and of the right of the state or of the United States to lease such ranges.

Held, that where a state rifle range was purchased from a Federal allotment for "promotion of rifle practice" under section 1661, Revised Statutes, and the title thereto vested in the United States, there was no legal authority for its leasing by the state to the United States and the payment of rental therefor.

Held further, that while these ranges are the property of the United States, and while they are under the immediate control of the militia authorities of the state, they are subject to the general authority of the War Department, and that the Secretary of War, if all or any portion of any such a range shall not be needed for the use of the state militia, may authorize its lease under the provisions of the act of July 28, 1892 (27 Stat., 321), and that the funds derived from such leasing should be deposited in the Treasury of the United States to the credit of miscellaneous receipts.

(58-520, J. A. G., June 2, 1913.)

OFFICIAL CORRESPONDENCE: Telegram in relation to the purchase of a mount.

An officer of the Army required by law to be mounted at his own expense, was directed by his commanding officer to purchase a suitable mount for his use as field officer. He took the matter up with a purchasing officer of the Quartermaster Corps, and the latter sent

him a telegram informing him that he had found a suitable horse for his use, naming the price, and advising that it be purchased. The horse was accordingly purchased and afterwards approved as a suitable mount.

Held, that the telegram was but an incident to the purchase of the horse, and should be regarded as pertaining to the officer's private business and not to the official business of the Government.

(22-050, J. A. G., June 16, 1913.)

OFFICIAL RECORDS: Furnishing copies for use in court.

Copies of certain plans of work done by a contractor were desired by an attorney for use before a court in a suit against the contractor for an injury to a workman employed on the work.

Held, that where copies of bonds or other papers or records of the War Department are necessary in the administration of justice, and are applied for, it is usual to require a certificate of the tribunal before which the matter is pending to the effect that the same are necessary and material to such proceedings.

Advised, therefore, that the applicant be informed that a copy of the plans would be furnished for his use before the court, provided he should furnish a certificate or rule of the court to the effect that they are necessary or material to the administration of justice in the suit in question. Dig. Op. J. A. G., 1912, p. 829.

(66-124, J. A. G., June 25, 1913.)

PARDON: Effect of; forfeiture by desertion of the right to hold offices of trust and profit.

A member of the Philippine Scouts was, by sentence of court-martial, dishonorably discharged from the service of the United States for desertion and larceny, and in addition a term of imprisonment was imposed as punishment, which he served and was released. Upon application for pardon,

Held, that one of the effects of desertion was to forever bar the deserter from holding any office of trust or profit under the United States, and in this regard the disqualification was a continuing one, and hence capable of pardon.

Held, therefore, that the pardon had still matter upon which to operate and might properly be recommended.

(68-110, J. A. G., June 28, 1913.)

PARTNERSHIP: Payment to one member of a firm after the other has become bankrupt.

A contract for the construction of a power plant at an Army arsenal was made with a partnership composed of two members doing business under the name of one of the partners as the firm name. Thereafter, in a suit between the partners, one of them was by order of court appointed as managing partner of the firm with authority to carry out the Government contract. The managing partner thereupon filed a bond as required by the order of

the court and proceeded with the work under the contract, and a considerable amount became due for work performed. Since the order of the court appointing the managing partner the other partner went into bankruptcy, and a receiver in bankruptcy was appointed, who informed the commanding officer of the arsenal that he had determined that he had no right to complete the contract and would act accordingly.

Held, that the bankruptcy of a partnership dissolves the firm (30 Cyc., 654), and where the interest of one partner is transferred in bankruptcy or insolvency, the right to the control and disposition of the firm assets vests in the other partners (30 Cyc., 664).

Held further, that it was proper for the commanding officer to permit the managing partner to complete the work under the contract, and to draw checks in payment for the work done in the name of the firm and deliver the same to the managing partner, who had ample authority to indorse the firm name.

(76-331.23, J. A. G., June 2, 1913.)

POST EXCHANGE: Contracting with the Government to furnish electric light.

The post exchange at a certain military post operated for its own use a small electric plant and furnished light to several buildings. It was desired to know whether the exchange could be paid for light furnished to officers pursuant to regulations.

Held, that there was no reason why a post exchange might not enter into a contract with the Government for furnishing electric current for lighting the authorized allowance of quarters for officers on duty at the post.

(40-041, J. A. G., June 19, 1913.)

PUBLIC BUILDINGS: Restrictions on expenditures upon public buildings or military posts.

The act of February 27, 1893 (27 Stat., 484), provides:

"Hereafter no expenditures exceeding five hundred dollars shall be made upon any building or military post, or grounds about the same, without the approval of the Secretary of War for the same, upon detailed estimates of the Quartermaster's Department * * *."

It was proposed to amend paragraph 718, Army Regulations, 1910, reading "Nor will any expenditures exceeding \$500 be made upon any building or grounds at any post, fort, arsenal, or depot without the approval of the Secretary of War and upon detailed estimates submitted to him," so as to exclude arsenals therefrom. It was further proposed that the Secretary of War should delegate authority to act in his name in the approval of expenditures upon public buildings and grounds within certain limits of cost, to the heads of the staff departments.

Held, that although the provision placing restrictions upon the amount to be expended upon buildings or military posts was contained in the part of the law appropriating for barracks and quarters under the control of the Quartermaster's Department, the lan-

guage of the law was broad enough to include arsenals, and that the latter were subject to the restriction.

Held, further, that the law implies the exercise of a discretion upon the part of the Secretary of War, and that he can not lawfully delegate such discretion to a subordinate officer.

(52-241, J. A. G., June 16, 1913.)

PUBLIC PROPERTY: Employment of experts on land values to assist a board of appraisers; appropriation chargeable.

A board of appraisers had been appointed pursuant to an agreement to ascertain the value of the land and water rights on Lobos Creek, Cal., belonging to the Spring Valley Water Co. with a view to their purchase by the Government; and the assistance of experts on land values was desired to aid the board in arriving at a proper conclusion.

Held, that the employment of experts to assist the board of appraisers was proper under the circumstances, and that the expenses should be charged to the appropriation of \$100,000 "for the purchase of land and acquirement of water rights on Lobos Creek, Cal.," etc., contained in the act of March 4, 1909 (35 Stat., 1003).

(80-210, J. A. G., June 24, 1913.)

PUBLIC WORKS: Disposal of the right to the temporary use of.

Certain private parties desired the exclusive use of the United States Government's easterly breakwater in Chicago Harbor for a limited time for the purpose of holding a carnival, with permission to charge an entrance fee to all who might desire to enter thereon. Section 14 of the act of March 3, 1899 (30 Stat., 1152), provides among other things that—

"The Secretary of War may, on the recommendation of the Chief of Engineers, grant permission for the temporary occupation or use of any of the aforementioned public works whenever in his judgment such occupation or use will not be injurious to the public interest."

The "aforementioned public works" refers back to an enumeration which includes those of the same character as the breakwater mentioned.

Held that the statute above quoted was ample authority for granting the request for the temporary occupation of said breakwater.

(80-816.1, J. A. G., June 18, 1913.)

PURCHASE OF SUPPLIES: From regimental or company exchange; post exchange.

Certain lumber was purchased by the commanding officer of a Signal Corps company from the Twenty-second Infantry Exchange while the two organizations were on duty on the Mexican border, for immediate use in the construction of a frame for a hospital tent to be used as a shelter for valuable instruments belonging to the United States.

Held, that a regimental or company exchange, being organized along the same lines and for the same purposes as a regular post exchange, although not recognized as a governmental agency by regulations, might properly be regarded as an extension of the post exchange, and that the bill in question might be settled the same as if the purchase had been made from a post exchange.

(40-100, J. A. G., June 19, 1913.)

STENOGRAPHIC REPORTER: Employment of an enlisted man.

An enlisted man at a post was employed as stenographic reporter of a board appointed to examine into and report upon the mental status of a general prisoner, and he presented a bill for his services at the rate of 5 cents per 100 words. The act of August 24, 1913 (37 Stat., 575), provides:

"That hereafter enlisted men may be detailed to serve as stenographic reporters for general courts-martial, courts of inquiry, military commissions, and retiring boards, and while so serving shall receive extra pay at the rate of not exceeding five cents for each one hundred words taken in shorthand and transcribed, such extra pay to be met from the annual appropriation for expenses of courts-martial, and so forth."

Held, that as the law only provided for employing enlisted men as stenographic reporters and paying extra compensation therefor when detailed to serve as reporters for general courts-martial, courts of inquiry, military commissions, and retiring boards, which designations did not embrace a board of the character in question, there was no authority for paying for this extra service.

(72-237, J. A. G., June 26, 1913.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

ABSENCE: Leave of, to per diem employees at the United States Military Academy; dally employees.

The Secretary of War requested a decision whether, if regulations were promulgated by his department providing for a leave of absence with pay to employees at the Military Academy when their compensation is fixed either on a per annum, a per month, or a per diem basis, they could be paid for such absence as might be authorized by the regulations.

Held, that the granting of a leave of absence with pay to employees whose compensation is fixed by law is a matter within the discretion of the Secretary, but for those whom he is authorized to employ under lump-sum appropriations, the compensation and terms of employment are matters of agreement between the parties; that where the compensation is on a per annum basis, there is a degree of permanency of employment which makes proper the exercise of executive discretion in agreeing with the employee for a leave of absence with pay, and the same is true with regard to those employed on a per diem basis where the rate of pay merely measures the com-

pensation and does not make the employment one by the day, and where there is, therefore, the same degree of fixed compensation and permanency as in the case of pay on an annual basis.

Held, however, that where the employment is from day to day at a certain sum for a day's wages, although the time of employment is indefinite, it would be foreign to the character of the employment to agree to a leave of absence with pay, and the granting of the same would be unauthorized.

Held further, that the granting of a leave of absence with pay to employees paid from lump-sum appropriations pursuant to such an agreement does not fall within the prohibition of section 4 of the act of March 4, 1913 (37 Stat., 790), providing that no part of any money therein or thereafter appropriated in lump sum should be available for the payment of personal services at a rate of compensation in excess of that paid for the same or similar services during the preceding fiscal year.

(Comp. R. J. Tracewell, Apr. 17, 1913.)

ALLOWANCES: Quarters, and heat and light; officer serving with troops.

An officer of the Army serving with troops in China was furnished by the Quartermaster Corps with one bedroom in a hotel rented by the quartermaster for the purpose at a certain rate per month, including heat and light. The officer's rank entitled him to three rooms as quarters.

Held, that it is the duty of the Quartermaster Corps to provide quarters for officers of the Army on duty with troops, and that an officer on duty with troops is entitled only to such quarters in kind as may be provided for him, not exceeding the maximum allowance for his rank, whether the same be the number of rooms allowed for his rank, a single room, or a tent; and that if the same be heated and lighted at Government expense, he is not entitled to any additional allowance on that account. (18 Comp. Dec., 592.)

(Asst. Comp. W. W. Warwick, June 3, 1913.)

APPROPRIATIONS: Lump-sum; payment for personal services; transfer from position with specified compensation.

Section 7 of the general deficiency act of August 26, 1912 (37 Stat., 626), as amended by section 4 of the act of March 4, 1913 (37 Stat., 790), reads:

"That no part of any money contained herein or hereafter appropriated in lump sum shall be available for the payment of personal services at a rate of compensation in excess of that paid for the same or similar services during the preceding fiscal year; nor shall any person employed at a specific salary be hereafter transferred and hereafter paid from a lump-sum appropriation a rate of compensation greater than such specific salary, and the heads of departments shall cause this provision to be enforced. * * *"

The question was submitted whether the latter part of said section 7 prohibits the appointment as special agent in the Indian

Service at a salary of \$2,000 per annum of a clerk in the Bureau of Indian Affairs holding a position with a salary fixed by law at less than \$2,000 per annum.

The appropriation "General expenses, Indian Service, 1913," reads in part:

"For pay of special agents at two thousand dollars per annum; for traveling and incidental expenses of such special agents, including sleeping-car fare, and a per diem of three dollars in lieu of subsistence when actually employed on duty in the field or ordered to the seat of government; * * * for pay of employees not otherwise provided for; * * * \$125,000." (Act of Aug. 24, 1912, 37 Stat., 521.)

Section 3 of the act of August 23, 1912 (37 Stat., 413), contains a similar provision to that found in section 7 of the general deficiency act of August 26, 1912, *supra*, limited to the appropriations in lump sum contained in the act, and the compensation restricted to the rates paid during the fiscal year 1912.

Held, that in so far as the employment of special agents were concerned, the appropriation for general expenses of the Indian Service was not a lump-sum appropriation, and that the appointment of a clerk in the Bureau of Indian Affairs holding a position with a salary fixed at less than \$2,000 per annum, as a special agent at \$2,000 per annum, was not forbidden by the law, since it would be a transfer to a position the compensation of which was fixed by law, and which therefore was a statutory position and not one paid from a lump-sum appropriation. Overruling 19 Comp. Dec., 613.

The further question was submitted as to whether a clerk in the Bureau of Indian Affairs holding a statutory position could be transferred to a clerkship or a superintendency in the field service at an increased salary to be paid from a lump-sum appropriation, not in excess of that paid for similar services during the fiscal year 1912. The position held in the bureau at Washington had no relation or similarity so far as duties were concerned to the position in the field.

Held, that a *bona fide* transfer is not prohibited from a position at a specific salary to a position in the field paid from a lump-sum appropriation at a higher salary, the latter position having duties not in fact the same or similar to those of the former and the rate of compensation not being in excess of the rates specified in the first part of section 7 of the act of August 26, 1912, which fixes a limit to the pay from a lump sum appropriation for personal services; and that the transfer proposed could be made, subject to the limitations stated.

(Comp. Geo. E. Downey, June 6, 1913.)

GRATUITY: Six months' pay to representative of deceased soldier; designation of beneficiary.

The act of May 11, 1908 (35 Stat., 108), as amended, provides that upon the death of an officer or enlisted man in the active service from wounds or disease not the result of his own misconduct, an amount equal to six months' pay at the rate the soldier was receiving at the time of his death shall be paid to his widow or to any other

person previously designated by him. Said act further provides that:

"The Secretary of War shall establish regulations requiring each officer and enlisted man to designate the proper person to whom this amount shall be paid in case of his death * * *."

Paragraph 1408, Army Regulations, 1910, makes detailed provision for the manner of designating the beneficiary as provided in said act, and specifically provides that:

"Should an officer or enlisted man desire to change a beneficiary previously designated by him and to make a new designation, he may do this by filling up and forwarding to The Adjutant General of the Army another blank of the prescribed form, properly signed, witnessed, and attested."

An enlisted man duly designated his mother as beneficiary. Subsequently in a letter purporting to be signed by him he stated: "I want my remains sent to my mother * * * and my beneficiaries paid to my wife." This letter was delivered to the commanding officer of his company several days after notification of the soldier's death.

Held, that while no departure from the regulations should be recognized, excepting where it is clear that any informal designation is entirely free from doubt, fraud, or mistake, in this case, if it satisfactorily appears that the communication expressing the desire that his wife should receive his death benefit was signed by the soldier, and that the person claiming to be his widow was lawfully such, payment of six months' gratuity might be made to her, subject to authorized deductions.

(Asst. Comp. W. W. Warwick, June 21, 1913.)

HEAT AND LIGHT: Allowance to members of the Nurse Corps of the Navy; appropriation available.

A voucher was presented for the payment for gas furnished to quarters leased by the Government and occupied by members of the Nurse Corps of the Navy. The rent for the quarters was paid from the appropriation for the pay of the Navy under the heading "Rent of quarters for members of the Nurse Corps." The Nurse Corps (female) of the Navy was established by the act of May 13, 1908 (35 Stat., 146), which provides that the superintendent, the chief nurse and nurses shall respectively receive "the same pay, allowances, emoluments and privileges as are now or may hereafter be provided by or in pursuance of law for the nurses of the Nurse Corps (female) of the Army."

The Army Nurse Corps referred to was established by the act of February 2, 1901 (31 Stat., 753), which fixes the pay and allowances of the superintendent and nurses of the Corps and provides, among other things, that "they shall be entitled to quarters."

Paragraph 1061, Army Regulations, 1910, fixes the allowance of quarters for members of the Nurse Corps on detached service or on special duty in places where there are no public quarters available, at two rooms each, and provides that in hospitals or where buildings have been provided for them heat and light will be supplied as may be necessary.

The act of March 2, 1907 (34 Stat., 1167), makes provision for furnishing heat and light "actually necessary for the authorized allowance of quarters for officers and enlisted men" of the Army, at the expense of the United States.

Held, that the members of the Nurse Corps came within the meaning of the words "officers and enlisted men" in said act of March 2, 1907, and were entitled to have heat and light furnished for their authorized allowance of quarters, and that the voucher should be paid from the appropriation "Pay of the Navy," from which appropriation bills for heat and light furnished to officers were paid.

(Asst. Comp. W. W. Warwick, June 4, 1913.)

HEAT AND LIGHT: Allowance of, for officers' quarters; payment of commuted value to officer; number of rooms occupied.

An officer of the Navy whose rank entitled him to four rooms as quarters, occupied quarters not owned by the Government and heated by the owner thereof. He had been furnished at Government expense 4,000 cubic feet of gas for kitchen use, which was less than the total amount to which he was entitled as an officer of his rank for his authorized allowance of quarters. An officer of the Navy is entitled to the same allowances, with certain exceptions, as are provided by law and regulations for an officer of corresponding rank in the Army. The Army act of March 2, 1907 (34 Stat., 1167), provides:

"Hereafter heat and light actually necessary for the authorized allowance of quarters for officers and enlisted men shall be furnished at the expense of the United States under such regulations as the Secretary of War may prescribe."

Paragraph 1052, Army Regulations, 1910, provides that:

"* * * Where an officer or noncommissioned officer is occupying quarters other than public, not heated by a separate plant, or for which it is impracticable to furnish fuel in kind, the Quartermaster's Department will pay the owner or authorized agent of such quarters for the heat at a rate of \$4 a cord for the fuel allowance for the number of rooms to which the rank of the officer or noncommissioned officer entitles him as set forth in the table of allowances, paragraph 1060."

Paragraph 1060 of said regulations prescribes a fuel allowance of 3½ cords of wood per month to an officer occupying four rooms as quarters during the season the officer in question was in such occupancy. Paragraph 1056 of said regulations provides that:

"Merchantable oak wood is the standard; the cord is 128 cubic feet. The scale of equivalents to govern in the issue and sale of fuel will be published from time to time in general orders."

Held, that payment could be made to the officer of the commuted value of the fuel allowance computed according to the table of equivalents for heat furnished for the number of rooms actually occupied by him, not exceeding four, less the amount already paid for gas for kitchen use. See in this connection 14 Comp. Dec., 475.

(Comp. R. J. Tracewell, Apr. 23, 1913.)

A chief carpenter, United States Navy, entitled by law to the same allowances of heat and light for his authorized allowance of

quarters as a second lieutenant in the Army, occupied, from May 1 to October 21, 1907, two rooms as his private rented quarters, which were heated and lighted by gas not separately measured or charged for. The Army Regulations then in force provided:

"Each officer * * * entitled to and occupying public quarters, or quarters other than public where gas * * * is installed, will be allowed, at the expense of the United States, for each room to which his rank entitles him, for the period between September 1 and April 30, 1,500 cubic feet of gas, * * * and from May 1 to August 31, 900 cubic feet of gas * * * per month.

"Where an officer * * * occupies quarters other than public, which are lighted by gas, * * * and the quantity supplied is not measured by separate meter readings, the Quartermaster's Department will make settlement with the owner or authorized agent for light for the number of rooms to which the rank of the officer * * * entitles him, in accordance with the prescribed allowance.

"Where an officer * * * is occupying quarters other than public, not heated by a separate plant, or for which it is impracticable to furnish fuel in kind, the Quartermaster's Department will pay the owner or authorized agent of such quarters for heat at the rate of \$4 per cord for the fuel allowance for the number of rooms to which the rank of the officer * * * entitles him as set forth in the table of allowances, paragraph 1051."

See paragraphs 1043 and 1063, Army Regulations, 1904, as amended by General Orders, War Department, No. 61, March 22, 1907.

Held, That the effect of these regulations amounted to a practical commutation to officers of the maximum amounts of their heat and light allowances in cases where quarters other than public are occupied, and neither the heat nor light allowance therefor is separately measured.

Held further, That there was no objection to making the payment of the commuted value of these allowances directly to the officer. The claimant was therefore given the maximum allowance for heat and light for two rooms occupied by him for the period stated. See, however, 14 Comp. Dec., 35, 39, and id., 475.

(Comp. R. J. Tracewell, Apr. 24, 1913.)

A lieutenant commander of the Navy, entitled to five rooms as quarters, was in receipt of commutation of quarters and occupied one room as quarters at the Army and Navy Club Building, Washington, D. C., which was neither heated nor lighted at Government expense, and neither heat nor light furnished therefor was separately measured.

Held, On revision of the action of the auditor, that the officer should be paid the maximum allowance for heat and light for one room during the period of such occupancy. In this connection see 14 Comp. Dec., 475.

(Comp. Geo. E. Downey, May 26, 1913.)

PAY OF OFFICERS: Ten per cent increase for foreign service; detail to the Philippine Constabulary.

The act of January 30, 1903 (32 Stat., 783), provides as follows:

"That officers of the Army of the United States may be detailed for service as chief and assistant chiefs, the said assistant chiefs not

to exceed in number four, of the Philippine Constabulary, and that during the continuance of such details the officer serving as chief shall have the rank, pay and allowances of brigadier general, and the officers serving as assistant chiefs shall have the rank, pay and allowances of colonel: *Provided*, That the difference between the pay and allowances of brigadier general and colonel, as herein provided, and the pay and allowances of the officers so detailed in the grades from which they are detailed shall be paid out of the Philippine treasury."

It appeared to have been the practice since the passage of said act to pay officers of the Army detailed for duty as chief and assistant chiefs of the Philippine Constabulary the ten per cent increase in pay authorized by law for foreign service as of their rank in the United States Army, but the act had not received any formal construction by the accounting officers of the Government upon this particular point. The Auditor for the War Department submitted to the comptroller his construction of said act, holding that officers detailed for service with the Philippine Constabulary should be paid the ten per cent increase of pay authorized for foreign service.

Held, that Army officers so detailed and serving were performing civil and not military duties, and were therefore not entitled to receive from the United States the ten per cent increase upon the pay of the grades held by them in the United States Army as for foreign service. The Auditor's construction was therefore disapproved.

(Asst. Comp. W. W. Warwick, June 23, 1913.)

PURCHASE OF SUPPLIES: For the use of the branches of the Army service in Washington; general supply committee; office of depot engineer, Washington, D. C.

Section 4 of the act of June 17, 1910 (36 Stat., 531), provides:

"That hereafter all supplies of fuel, ice, stationery, and other miscellaneous supplies for the executive departments and other Government establishments in Washington, when the public exigencies do not require the immediate delivery of the article, shall be advertised and contracted for by the Secretary of the Treasury, instead of by the several departments and establishments, upon such days as he may designate. There shall be a general supply committee in lieu of the board provided for in section thirty-seven hundred and nine of the Revised Statutes as amended, composed of officers, one from each such department, designated by the head thereof, the duties of which committee shall be to make, under the direction of the said Secretary, an annual schedule of required miscellaneous supplies, to standardize such supplies, eliminating all unnecessary grades and varieties, and to aid said Secretary in soliciting bids based upon formulas and specifications drawn up by such experts in the service of the Government as the committee may see fit to call upon, who shall render whatever assistance they may require * * *."

On submission of certain questions relating to the purchase of supplies for the use of the various branches of the Army situated in Washington, either for use in Washington or for shipment therefrom to the service outside:

Held, That the War Department can lawfully enter into contracts for the delivery of supplies embraced in the schedule of the general

supply committee, said supplies either to be delivered in Washington for consumption by some branch of the outside service located therein and not a part of the department proper or for storage and subsequent reshipment to the outside service, independently of the act of June 17, 1910.

Held further, That similar purchases of supplies may be made by a branch of the outside service located for convenience in Washington but not a part of the department itself, for the use of said service in the District of Columbia or outside thereof, and that the local engineer officer of the engineer district composed of the States of Maryland and Virginia and the District of Columbia, who is located in Washington for convenience and not by law, might purchase supplies of the class or kind embraced in the schedule of the general supply committee without complying with the requirements of said act.

(Comp. Geo. E. Downey, June 20, 1913.)

QUARTERS: Commutation while awaiting transportation.

An officer of the Army on duty at a post with troops was directed to proceed to San Francisco at the proper time to take a transport leaving for Manila, P. I., and to take transportation thereon, for assignment to duty on arrival at Manila. Subsequently and before leaving his post he was granted a leave of absence extending beyond the time the transport was scheduled to sail. Before the expiration of his leave and after the date of the sailing of the transport his orders were amended so as to direct him to report to the commanding officer at San Francisco, Cal., on or before a certain date for temporary duty and to proceed to the Philippine Islands on the first available transport after that date. His order also detached him from his former command. He reported January 7, was assigned to duty with station at San Francisco, Cal., and embarked for Manila on the transport sailing March 15.

Held, that if he was actually engaged in the public service during the period he was awaiting the sailing of the transport, he was entitled to commutation for quarters, provided no public quarters were available there for his use.

(Asst. Comp. W. W. Warwick, June 7, 1913.)

QUARTERS: Furnished in kind; authority to procure.

A quartermaster sergeant presented a claim for reimbursement for the amount claimed to have been expended by him from his private funds for the hire of quarters for his use while temporarily stationed at Washington Barracks, Washington, D. C. He stated that there being no quarters available at the post, one room was leased for him, but that this lease was canceled necessitating the payment by him of rent from his private funds for the use of the room after the cancellation of the lease. There was no evidence submitted showing that the soldier was authorized to procure private quarters for himself at Government expense.

Held, that as there was no authority shown for the hire by the soldier of private quarters for his use, the claim must be treated as one for commutation, and that commutation of quarters was forbidden by the proviso contained in the appropriation "Barracks and quarters" in the Army appropriation act, which provides:

"That no part of the moneys appropriated shall be paid for commutation of fuel or quarters to officers or enlisted men." (Act Aug. 24, 1912, 37 Stat., 581.)

The claim was therefore disallowed.

(Asst. Comp. W. W. Warwick, June 20, 1913.)

QUARTERS: Furnished in kind; temporary duty.

An officer while on duty at a post with troops was assigned to temporary duty in the office of the judge advocate of the division at the headquarters near by where there were no quarters available for him. He formally relinquished his right to quarters which he had previously occupied and requested that his family be allowed to retain the occupancy of the same during his assignment to the temporary duty. His family continued to occupy his quarters and the officer himself occupied them at night, going to and returning from his place of duty at his own expense. He claimed commutation of quarters while on this temporary duty.

Held, that the officer having actually occupied public quarters during the entire period covered by the claim, either by right or by courtesy, he was not entitled to commutation therefor, and the fact that the quarters he occupied at his prior station were not needed for other officers was immaterial.

Held further, that this officer's case was distinguished from that of Col. Glenn (19 Comp. Dec., 379) in that said officer's new station was so far removed from his old station that he could not share the quarters occupied by his family through the courtesy of the commanding officer of the old station.

(Asst. Comp. W. W. Warwick, June 13, 1913.)

TIME: Computation of, for purposes of pay; pay for the 31st day of a month.

An officer of the Medical Reserve Corps was called into active service pursuant to the act of April 23, 1908, for only one day, that being the 31st day of the month. Section 9 of said act (35 Stat., 68), provides:

"That officers of the Medical Reserve Corps when called upon active duty in the service of the United States, as provided in section eight of this act, shall be subject to the laws, regulations, and orders for the government of the Regular Army, and during the period of such service shall be entitled to the pay and allowances of first lieutenants of the Medical Corps * * *"

Section 6 of the sundry civil appropriation act of June 30, 1906 (34 Stat., 763), provides that:

"Hereafter, where the compensation of any person in the service of the United States is annual or monthly the following rules for division of time and computation of pay for services rendered are hereby established: Annual compensation shall be divided into twelve equal installments, one of which shall be the pay for each calendar month; and in making payments for a fractional part of a month one-thirtieth of one of such installments, or of a monthly compensation, shall be the daily rate of pay. For the purpose of computing such compensation and for computing time for services rendered during a fractional part of a month in connection with annual or monthly compensation, each and every month shall be held to consist of thirty days, without regard to the actual number of days in any calendar month, thus excluding the thirty-first of any calendar month from the computation and treating February as if it actually had thirty days. Any person entering the service of the United States during a thirty-one day month and serving until the end thereof shall be entitled to pay for that month from the date of entry to the thirtieth day of said month, both days inclusive; and any person entering said service during the month of February and serving until the end thereof shall be entitled to one month's pay, less as many thirtieths thereof as there were days elapsed prior to date of entry: *Provided*, That for one day's unauthorized absence on the thirty-first day of any calendar month one day's pay shall be forfeited."

Held, that although the employment of a person in the service of the United States at an annual or monthly compensation upon the 31st day of a month was not forbidden by law, he could not legally be paid for such day, and that the officer in this case could not be paid for the 31st day of the month: 13 Comp. Dec., 75.

(Asst. Comp. W. W. Warwick, June 23, 1913.)

TRAVELING EXPENSES: Hire of automobile for travel of an Army officer within a limited area.

The Auditor for the War Department disallowed payments for services rendered April 28 and 29 and June 6 and 7, 1912, in furnishing automobile transportation to a department commander for the purpose of obtaining topographical and other information in the theater of Army maneuvers within a limited area, and at points inaccessible by common carrier, and where horses could not be provided and used without additional expense in excess of the amount charged for the automobiles. The officer was in a mileage status at the time the journeys were performed, but no mileage was paid for such journeys.

Held, that the officer being in a mileage status was entitled, for all travel performed by him under his orders, only to the mileage allowed by law, and payment for automobile hire was unauthorized.

(Asst. Comp. W. W. Warwick, June 27, 1913.)

OPINIONS OF THE ATTORNEY GENERAL.

(Digests prepared in the office of the Judge Advocate General.)

EIGHT-HOUR LAW: Public-building contracts; appropriations made before the passage of the act.

The act of June 19, 1912, commonly known as the eight-hour law, contains at the end of section 2 the following qualification (37 Stat., 138):

"Nothing in this act shall be construed to * * * apply to contracts which have been or may be entered into under the provisions of appropriation acts approved prior to the passage of this act."

Held, that where Congress has fixed the limit of cost of a public building and made a partial appropriation therefor prior to June 19, 1912, but subsequently thereto has increased the limit of cost, the contract for the erection of said building, whether entered into before or after the time when said limit of cost was so increased, was excepted from the operation of section 1 of the eight-hour law of June 19, 1912 (37 Stat., 137).

(30 Op. 150, Apr. 19, 1913.)

EMPLOYEES: Compensation act; jurisdiction of the Secretary of Labor.

The act of May 30, 1908 (35 Stat., 556), providing for compensation to employees for injuries received in the Government service under certain conditions, contains the provision that the final decision of claims arising under said act shall lie with the Secretary of Commerce and Labor, under regulations prescribed by him. Section 3 of the act of March 4, 1912 (37 Stat., 737), creating the Department of Labor, provides that certain named "offices, bureaus, divisions, and other branches of the public service," then and theretofore under the jurisdiction of the Department of Commerce and Labor, and all that pertain to the same, including the Bureau of Labor and the office of the Commissioner of Labor, shall be transferred from the Department of Commerce and Labor to the Department of Labor, and shall thereafter remain under the jurisdiction and supervision of the last-named department.

Held, that final authority to determine claims arising under the workmen's compensation act of May 30, 1908, *supra*, as amended, rests in the Secretary of Labor.

(30 Op. 145, Apr. 3, 1913.)

PUBLIC PROPERTY: Leasing of water power created by the construction of Government works.

The United States erected a lock and dam on the Black Warrior River, Ala., and the question arose as to the right to lease the water power incidentally created thereby.

Held, that, assuming that the Federal Government had the right to dispose of surplus water created by a dam erected by it in improving the navigation of a navigable water of the United States within a State, it was manifest that, under the Constitution (Art. IV, sec. 3), such right of disposal resided solely in Congress, and that the Secretary of War had no right, under existing legislation, to enter into an agreement for leasing water power created by said lock and dam.

(30 Op. 154, Apr. 21, 1913.)

DECISIONS OF THE COURTS.

(Digests prepared in the office of the Judge Advocate General.)

CONTRACTORS' BONDS: Suits on; jurisdiction of courts.

The act of August 13, 1894 (28 Stat., 278), requires bonds from Government contractors for the protection of persons furnishing labor and material for the construction of public works upon which they may be engaged, giving a right of action upon the bond in favor of such persons. The act contains no direction respecting where the suit upon the bond of the contractor shall be brought or what court shall take jurisdiction. The act of February 24, 1905 (33 Stat., 811), amends the act of August 13, 1894, by reenactment, making many important changes and specifying that only one action shall be brought upon a bond and fixing the time when, and the court in which, said action shall be brought. An action was brought upon a contractor's bond executed on May 24, 1904, in the court authorized by section 5 of the act of August 13, 1894 (28 Stat., 280), regulating surety companies which execute bonds required by the laws of the United States. The surety company entered a plea to the jurisdiction of the court, contending that as the work done and materials furnished were done and furnished after the passage of the act of February 24, 1905, the action should have been commenced in the district pointed out in the latter act. A demurrer to the plea was sustained.

Held, that the court below was clearly right in upholding its jurisdiction, for to hold otherwise it would be necessary to construe the act of 1905 as retroactive in all cases where work had been done after its passage on contracts executed prior to said act.

(*Title Guaranty and Surety Co. v. United States*, U. S. Supreme Court, May 12, 1913.)

INSURRECTION AND MARTIAL LAW: Constitutionality of executive acts after declaration of a State war.

Referring to the insurrectionary conditions existing in the State of West Virginia, the Supreme Court of Appeals of that State laid down the following principles:

1. The principles and conclusions of law announced in *State ex rel. Mays v. Brown, Warden*, and *State ex rel. Nance v. Brown, Warden* (W. D. Bul. 17, p. 24, c. s.), having been reexamined, after thorough argument and consideration, are approved and reaffirmed.

2. A state of war having been declared in any part of the State on an occasion of insurrection, the war power of the State in the form of military rule, defined by the usages of nations, prevails in the territory subject to the proclamation, excluding the civil powers as to offenses, if the executive so order, while the peace powers of government under civil law prevail elsewhere.

3. In such case the governor may cause to be apprehended, in or out of the military zone, all persons who shall willfully give aid, support, or information to the insurgents, and detain or imprison them, pending the suppression of the insurrection.

4. Sections 6, 7, 8, and 9, of chapter 14 of the code, authorizing such arrest and imprisonment, do not violate the provisions of the State and Federal constitutions, inhibiting deprivation of liberty without a trial by jury, and are constitutional and valid.

5. Being so, such an arrest, detention, and imprisonment, by virtue of said statute, are effected by due process of law within the meaning of section 10 of Article III of the Constitution of this State and the fourteenth amendment to the Constitution of the United States.

(*In re Mary Jones and others*, Mar. 21, 1913.)

PUBLIC PROPERTY: Recovery of property alleged to belong to the United States.

An action of replevin was brought for the recovery of certain soldiers' clothing siezed under the orders of officers of the United States Army. It was stipulated that certain of the property belonged to the plaintiff, but that other of said property, "consisting of clothes and military outfit," had been furnished prior to said seizure by the United States to certain of its soldiers. Aside from this stipulation, the plaintiff offered no evidence of title or right to possession of the property.

Held, that an admission that certain clothing was "furnished" by the United States to its soldiers, raised the presumption that the United States then had title thereto, and such title was not shown to have been divested merely because the clothing was so furnished.

Held further, that the right of recaption is a part of the common law of the Philippine Archipelago, that it belongs to any citizen under proper restrictions, and that *a fortiori* it belongs to the sovereign power and its agents. It was accordingly *adjudged* that the plaintiff should recover none of the property described in the stipulation as having been furnished by the United States to certain of its soldiers.

(*Tan Te v. J. Franklin Bell et al.*, Court of First Instance, District of Manila, Dec. 14, 1912.)

BULLETIN 27.

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No. 27. }

WAR DEPARTMENT,
WASHINGTON, *August 11, 1913.*

The following digest of opinions of the Judge Advocate General of the Army for the month of July, 1913, and of certain decisions of the Comptroller of the Treasury, and of an opinion of the Attorney General, is published for the information of the service in general.

[A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

W. W. WOTHERSPOON,
Major General, Acting Chief of Staff.

OFFICIAL:

H. O. S. HEISTAND,
Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

APPROPRIATIONS: Special; National and International Shooting Competition, Camp Perry, Ohio.

An opinion was requested as to whether or not the cost of certain plumbing supplies required for use at the National and International Shooting Competition, 1913, at Camp Perry, Ohio, should be paid for from the special appropriation therefor contained in the Army appropriation act of March 2, 1913 (37 Stat., 711), or from the general appropriation for waters and sewers.

Held, that the former appropriation was evidently intended to cover all proper expenses in connection with said International Rifle Shooting Competition, and that the cost of said plumbing supplies should be charged to said appropriation, and not to the general appropriation for waters and sewers.

(5-500, J. A. G., July 5, 1913.)

APPROPRIATIONS: Lump-sum; payment for personal services at increased rates.

Section 7 of the act of August 26, 1912 (37 Stat., 626), as amended by section 4 of the act of March 4, 1913 (37 Stat., 790), prohibited the payment for personal services from the lump-sum appropriations mentioned in the former act at rates in excess of those paid for the same or similar services during the preceding fiscal year. The amendatory act further provided—

“That this section shall not apply to mechanics, artisans, their helpers and assistants, laborers, or any other employees whose duties are of similar character and required in carrying on the various manufacturing or constructing operations of the government.”

It was desired to increase the compensation of the foreman in the sponging and shrinking plant at Philadelphia, Pa., beyond the amount he had received during the preceding fiscal year. He was described as a foreman of laborers but was also described as the only employee of his class.

Held, that while under the eight-hour law of August 1, 1892 (27 Stat., 340), a foreman of laborers was held not to come within the terms "laborers and mechanics" as used in said statute, the said law being penal in its nature (Dig. Op., J. A. G., 1912, p. 593, VII), a foreman within the meaning of section 4 of the act of March 4, 1913, should be classed with the particular employees whose work he is called upon to oversee, and that such an employee was excepted from the general provisions of section 7 of the act of August 26, 1912. *Held*, therefore, that the proposed increase could lawfully be made. (5-075, J. A. G., July 24, 1913.)

BURIAL EXPENSES: General prisoners.

On application for opinion as to whether the cost of burying a general prisoner could be paid from the appropriation "Contingencies of the Army," attention being invited to the opinion of this office of May 22, 1913 (W. D. Bul. No. 18, p. 4, c. s.), to the effect that there is no appropriation under the control of the War Department from which there could be paid the expenses of preparing the remains of a deceased general prisoner for shipment to his relatives, it was explained that the opinion cited had reference to the expenses incident to the preparation of the remains of a general prisoner for shipment to his relatives, and did not extend to the necessary expenses of preparing the body for burial at Government expense.

Held, that in the absence of a specific appropriation available for the purpose, and as the expense was incurred as an incident to the administration of the Army, the same was properly chargeable to the appropriation for "Contingencies of the Army," reference being made to the decision of the comptroller published in 11 Comptroller's Decisions, 789, 790. *Held further*, that the question was simply one of the decent and proper disposition of the remains of a general prisoner, the possession of which is cast upon the Government; and that the quartermaster in the interest of economy would be justified in making any reasonable arrangement with the relatives of the deceased whereby the cost of this service to the Government might be reduced.

(30-824.2, J. A. G., July 29, 1913.)

CIVIL SERVICE: Reduction or discharge of honorably discharged soldiers for inefficiency; system of efficiency ratings.

Section 4 of the legislative, executive, and judicial appropriation act of August 23, 1912 (37 Stat., 413), provides that—

"The Civil Service Commission shall, subject to the approval of the President, establish a system of efficiency ratings for the classified service in the several executive departments of the District of Columbia based upon records kept in each department and inde-

pendent establishment with such frequency as to make them as nearly as possible records of fact. Such system shall provide a minimum rating of efficiency which must be maintained by an employee before he may be promoted; it shall also provide a rating below which no employee may fall without being demoted; it shall further provide for a rating below which no employee may fall without being dismissed for inefficiency. All promotions, demotions, or dismissals shall be governed by provisions of the civil service rules. Copies of all records of efficiency shall be furnished by the departments and independent establishments to the Civil Service Commission for record in accordance with the provisions of this section: *Provided*, That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary. * * *

Upon a request for an opinion as to whether the proviso regarding the discharge or reduction of honorably discharged soldiers, etc., was operative at that time or would go into operation only after the Civil Service Commission should have established, with the approval of the President, a system of efficiency ratings—

Held, that the proviso regarding discharges and reductions following the provision for the establishment of a system of efficiency ratings, should be construed with reference to such provision with which it was associated and limited by the subject matter in the mind of Congress, and that so construed the proviso would become operative only when the system of efficiency ratings for the civil service in the several executive departments in the District of Columbia should be established in conformity with the provisions of the same section.

(16-112.1, J. A. G., July 2, 1913.)

CONTRACTS: Acceptance of work before completion according to contract and taking a bond; supplemental contract.

A contract was made for the construction of certain roads, walks, gutters, etc., at the Presidio of San Francisco, Cal. When the work had been completed it was found that the specifications had not been complied with in a certain particular and that the pavement in certain sections was unsatisfactory, whether from the failure to so comply with the specifications or not did not appear. The contractor proposed by way of compromise to relay the line surface of the unsatisfactory pavement with material prepared in accordance with the specifications and to give a bond to relay other portions where the specifications had not been complied with, should they prove at any time within two years to be unsatisfactory. It was reported that the Government would not be injured by the arrangement.

Held, that there was no authority for waiving the conditions of the contract, and for taking a bond to replace any portion of the work which did not prove satisfactory, without a consideration to the Government, but that if it was to the interest of the Government to accept the work, as finished, a supplemental contract might be entered into to accomplish the desired end.

(76-420, J. A. G., July 2, 1913.)

DETACHED SERVICE: Detail to the Philippine Constabulary; rank.

The Army appropriation act of August 24, 1912 (37 Stat., 571), provides generally that no officer holding a commission in the line of the Army below the rank of major who "shall not have been actually present for duty for at least two of the last preceding six years with a troop, battery, or company, of that branch of the Army in which he shall hold said commission," shall be detached or be permitted to remain detached from said organization for duty of any kind; but it is further provided therein, as follows:

"Nor shall anything in this proviso be held to apply to the detachment or detail of officers for duty * * * in the Philippine Constabulary until the first day of January, nineteen hundred and fourteen."

The further provision was added:

"And hereafter no officer holding a permanent commission in the Army with rank below that of major shall be detailed * * * as chief or assistant chief (director or assistant director) of the Philippine Constabulary and no other officers of the Army shall hereafter be detailed for duty with the said constabulary, except as specifically provided by law."

Held, that the two provisions limiting details were distinct, the first prescribing a rule of eligibility based on service and which was not to become effective as to the Philippine Constabulary until January 1, 1914, and the other prescribing a rule of eligibility based upon rank, which became immediately effective. *Held, therefore*, that a captain of cavalry could not be detailed as chief of the Philippine Constabulary with the rank, pay, and allowances of a brigadier general.

(92-412, J. A. G., July 3, 1913.)

DISCHARGE: Of enlisted men; discharge without honor; finality.

A soldier plead guilty in a State court to murder in the second degree and was sentenced to imprisonment in a State prison for 10 years. He was thereupon discharged from the Army without honor. In the State prison he developed mania and mental aberration, but after an operation by which a depressed portion of his skull was raised, these symptoms disappeared and he became rational. The depression was the result of an accident which occurred to him while in the service. He applied to have the discharge without honor substituted by an honorable discharge upon the ground of his mental aberration which was due to the skull depression.

Held, that it could not be assumed that if the Secretary of War had had all the facts before him that then appeared, his action would have been other than it was; but *held further*, that the Secretary having officially acted in the matter, his action became final and could not then be revoked.

(28-128 J. A. G., July 2, 1913.)

INDIANS: Support of; cutting and using hay from a military reservation.

It was requested on behalf of the Cree Indians that they be permitted to cut hay upon a military reservation for their use during

the coming winter, it being understood that the hay was necessary for their use and support.

Held, that while there was no authority of law for granting permission to Indians to cut hay from the reservation and take title to the same, such permission might be granted them to cut hay for their own use and support; that the Government sustained toward the Indians a different relation from that which it sustained to citizens in general; and that the use of the hay for their necessary support might, therefore, be regarded as a public use.

(80-816.1, J. A. G., July 9, 1913.)

INSTRUCTION: Schools at Army posts for children.

Schools for officers are established according to Army Regulations "for the instruction of officers on the subjects pertaining to the performance of their active duties," and the current appropriation therefor reads "equipment of officer's schools, military posts," etc. The establishment of schools for enlisted men at Army posts is authorized by section 431, Revised Statutes. The equipment and maintenance of these schools are authorized from year to year in appropriation acts for the support of the Army. Upon request for opinion as to whether any appropriation of the Quartermaster Corps was available for the establishment, equipment, and maintenance of schools for children at Army posts—

Held, that the appropriations above named were limited to schools for officers and enlisted men, respectively, and that there was no law which would authorize the establishment and maintenance by the War Department of schools for children at Army posts.

(80-304, J. A. G., July 21, 1913.)

MEDICAL DEPARTMENT: Acting dental surgeon; tenure of office and discharge of.

The act of March 3, 1911 (36 Stat., 1054), provides for a dental corps to be attached to the Medical Department of the Army, consisting of dental surgeons and acting dental surgeons, and further provides that—

"All original appointments to the dental corps shall be as acting dental surgeons, who shall have the same official status, pay, and allowances as the contract dental surgeons now authorized by law. Acting dental surgeons who have served three years in a manner satisfactory to the Secretary of War shall be eligible for appointment as dental surgeons, and, after passing in a satisfactory manner an examination which may be prescribed by the Secretary of War, may be commissioned with the rank of first lieutenant in the dental corps to fill the vacancies existing therein * * *."

An acting dental surgeon was appointed November 15, 1912, and was thereafter absent from duty by reason of sickness not contracted in line of duty, and an opinion was desired as to whether or not his services could be dispensed with if deemed unsatisfactory before the term of three years had expired, at the end of which he would be eligible for appointment as a dental surgeon if his services were satisfactory.

Held, that as the law provided that acting dental surgeons should have the same official status as contract dental surgeons had at the time of the passage of the act, and as such contract dental surgeons were employed for a term of three years under a contract which might be sooner annulled for certain reasons specified in the Army Regulations, the appointment of acting dental surgeon as now provided by law might be annulled or revoked in like manner, and that if the services of this particular acting dental surgeon were such as to bring him within any of the reasons for which the contract of a contract dental surgeon might have been annulled, his appointment might be revoked and his services dispensed with.

(6-2273, J. A. G., July 18, 1913.)

MILITARY RESERVATIONS: Erection of a memorial cannon thereon.

A chapter of the Daughters of the American Revolution desired permission to erect a memorial, consisting of a cannon weighing about 2,000 pounds, suitably inscribed and mounted, upon a portion of a United States military reservation, for the purpose of commemorating a historical event which took place near that spot during the American Revolution. The work would not interfere with the use of the reservation for military purposes.

Held, that, if such were the object, the memorial would serve a public purpose and would not be in the nature of a permanent improvement in which private rights might be acquired, and that permission might be granted for its erection and maintenance. It was *advised*, however, that the design and inscription should be subject to the approval of the Chief of Engineers.

(80-438, J. A. G., July 11, 1913.)

MILITARY TELEGRAPH LINES: Charging tolls on messages from other departments of the Government.

The act of May 26, 1900 (31 Stat., 206), establishing the Washington-Alaska military cable and telegraph system, provides:

"For the purpose of connecting headquarters, Department of Alaska, at St. Michael, by military telegraph and cable lines with other military stations in Alaska. * * *: *Provided*, That commercial business may be done over these military lines under such conditions as may be deemed, by the Secretary of War, equitable and in the public interests, all receipts for such commercial business shall be accounted for and paid into the Treasury of the United States * * *."

Section 2 of the act of October 1, 1890 (26 Stat., 653), provides that—

"The Chief Signal Officer shall have charge, under the direction of the Secretary of War of * * * the construction, repair, and operation of military telegraph lines * * *."

Held, that the effect of the language of the above acts was to make said lines an instrumentality of the War Department, and that they can not be transferred to another department without legislative authority. *Held further*, that there was nothing in the law that

would prohibit the War Department from charging tolls on messages from other departments, and transmitted over said system on official business, and the distribution of the tolls to the credit of the appropriations involved, on the principle that where supplies are furnished by one department or branch of the Government to another, the appropriations from which the supplies are furnished should be reimbursed by the department or branch of the Government to which they are furnished.

(80-471, J. A. G., July 24, 1913.)

NATIONAL CEMETERIES: Dedication of roads over.

A petition was presented for the dedication or setting aside of a strip of land along the north and west sides of a national cemetery at Nashville, Tenn., for the construction thereon of public streets. It appeared that the primary object in opening these streets was to make the adjoining properties more valuable for resident purposes.

Section 6 of the act of July 5, 1884 (23 Stat., 104), provides that—

“The Secretary of War shall have authority, in his discretion, to permit the extension of state, county, and territorial roads across military reservations; to permit the landing of ferries, the erection of bridges thereon; and permit cattle, sheep, or other stock animals to be driven across such reservation, whenever in his judgment the same can be done without injury to the reservation or inconvenience to the military forces stationed thereon.”

Held, that even if the national cemetery could be regarded as a military reservation within the meaning of said act, the use desired could not be considered as an extension of a state or county road through the reservation as contemplated by said act, and being in the nature of an easement in the land, the privilege could not be granted by means of a revocable license nor by means of a lease.

(80-412, J. A. G., July 15, 1913.)

NAVIGABLE WATERS: Structures over those lying wholly within the limits of a State; construction before approval of plans.

Section 9 of the act of March 3, 1899 (30 Stat., 1151), provides:

“That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided*, That such structures may be built under authority of the legislature of a state across rivers and other waterways the navigable portions of which lie wholly within the limits of a single state, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced.”

The county authorities of a state submitted plans for the construction of a bridge across a stream the navigable portion of which was presumably entirely within the state, which plans were approved

by the War Department. Thereafter said authorities submitted revised and entirely different plans and were informed that the same would be approved and the old plans canceled when bids for the construction of the bridge were actually received. The authorities, however, proceeded to erect the bridge according to the revised plan, which had not been approved but which provided for a better bridge for navigation interests than the one contemplated in the approved plans.

Held, that the bridge was technically an unlawful structure, and that the department had no authority to waive objections to its unlawful character. It was, however, recommended that the local engineer officer be informed that the Chief of Engineers and the Secretary of War are without authority to approve plans submitted after the construction has, as in this case, been completed; that inasmuch as the bridge was not constructed in accordance with plans approved as required by federal statutes, the department can not recognize it as a lawful structure; that while the department is without authority to make formal waiver of objections to the construction and maintenance of this bridge, there is nevertheless no present apparent reason for the department to take any affirmative action with respect thereto, and that at present it is deemed neither necessary nor desirable to do so.

(62-224, J. A. G., July 12, 1913.)

Plans were submitted for dredging and for the construction of a wharf which was to be an extension of a stone pier built under a license from the state authorities in the navigable waters of the state of Massachusetts, but without the federal permit required by section 3 of the act of July 13, 1892 (27 Stat., 110). The directors of the port of Boston, Mass., upon application and after published notice and hearing, licensed a company to build the pier and do the dredging, plans for which were submitted for approval. The company, without apparent knowledge of the requirement of the federal statute, had proceeded to the construction of about 330 feet of the 500-foot extension. The work was suspended pending approval of the plans submitted.

Held, That neither the original pier nor the work recently done could be recognized as a lawful structure, and that this character of the construction could be cured only by an act of Congress. It was therefore recommended as in the last preceding case.

(62-352, J. A. G., July 14, 1913.)

PRIVATE PROPERTY: Of deceased soldiers; disposition of, where the same is valueless.

A private soldier died in the service leaving a small amount of clothing and toilet articles, and a council of administration was appointed to dispose of his personal effects. These were put up at auction twice and no bids were received. A relative was notified that she could have the effects of the soldier, but a letter sent to her address was returned undelivered, and neither the War Department nor the Auditor for the War Department had any further data as to the name or address of any relative or legal representative of said deceased soldier.

Held, that the effects having no salable value and remaining unclaimed by any legal representative after due notice given might be used by the military authorities for deserters and general prisoners.

(6-155, J. A. G., July 9, 1913.)

PUBLIC PROPERTY: Sale of burial caskets to retired officers and to enlisted men of the Army.

Authority was requested at an Army general hospital for the sale to retired officers living in the vicinity and to enlisted men of the Army serving thereat of caskets or coffins for the burial of relatives who might die while such officers were in the vicinity of said post or such enlisted men serving thereat.

Held, that there was no legislative authority for the purchase of burial caskets or coffins for sale to retired officers of the Army, or to enlisted men, and that without such authority the sale of said articles could not properly be made to such officers and enlisted men.

W. D. Bul. No. 13, 1913, p. 12.

(80-132, J. A. G., July 21, 1913.)

PUBLIC PROPERTY: Use of, in commercial business.

An automobile road was about to be completed in the Philippine Islands between certain points, and authority was requested to use Government transportation vehicles over the same in the commercial service of carrying passengers and freight, and charging therefor, covering the receipts into the Treasury of the United States. No commercial transportation line was regularly established between said points.

Held, that the use of Government property for the purpose indicated would be a *pro tanto* disposition of the same and a diversion from the purposes of the appropriation from which such property had been purchased; and that such use of Government property would be unauthorized and illegal. (Dig. Op., J. A. G., 1912, p. 904, A3; W. D. Bul. No. 20, 1912, p. 15.)

(80-137, J. A. G., July 18, 1913.)

PURCHASE OF SUPPLIES: For Walter Reed General Hospital; contract with the Quartermaster Corps and the General Supply Committee.

By contract with the Quartermaster Corps an ice company undertook to supply the Walter Reed General Hospital in Washington, D. C., with ice for the period from January 1 to June 30, 1913, at the rate of 33 cents per hundred pounds. The price named in the contract of the same company under the award of the General Supply Committee made pursuant to section 4, act of June 17, 1910 (36 Stat., 531), for supplying the executive departments and other Government establishments in Washington with ice, was 28 cents per hundred pounds.

Held, that the Walter Reed General Hospital was a local branch or adjunct of the Army located in Washington as a matter of con-

venience, and not a Government establishment in Washington within the purview of said statute, and that the contract with the Quartermaster Corps for supplying ice to said hospital was binding, and vouchers for ice delivered thereunder should be prepared at the price named in said contract. (Comp. Dec., June 20, 1913.)

(14-120.1, J. A. G., July 22, 1913.)

QUARTERS: Certificate as to occupancy.

On the question raised as to the proper certificate as to occupancy of quarters, reference being made to the decision of the Comptroller of the Treasury of May 26, 1913 (W. D. Bul. No. 23, p. 16, c. s.), where an apartment was occupied by three officers, the apartment containing three living rooms, three bedrooms, one bathroom, one long hallway, one dining room, one kitchen, one maid's room, one pantry, and one storeroom.

Held, that, assuming that each officer occupied exclusively one living room and one bedroom and that the other rooms were occupied in common for their joint use, where officers furnish their own quarters and bear their share for the rental of rooms occupied in common by them, the occupancy should be divided among the several officers, and that if the officer in question has occupied two rooms exclusively, and has used three other rooms of sufficient size to count as quarters in common with two other officers, he would be justified in certifying that he had occupied his full allowance of three rooms as quarters; but, in view of the fact that the auditor had indicated that only such rooms as are occupied by an officer exclusively shall be included in the certificate, an explanation or statement should accompany the certificate showing the exact condition of the occupancy in common with the other officers.

(72-313, J. A. G., July 30, 1913.)

NOTE.—This case, where certain officers leased an entire apartment, jointly occupying certain rooms, should be distinguished from the cases covered by the decisions of the assistant comptroller dated July 30, 1913, post, where the rooms referred to as occupied in common with others were the public rooms of a club or hotel, so that the same could not be considered as the quarters of the officers.

RETIREMENT: Advanced grade; allowances.

An officer of the United States Army with Civil War service was retired from active duty as a colonel, June 7, 1912, after more than 46 years' service. On June 12, 1912, the Senate confirmed his nomination for advancement in grade, and, on June 21 following, he was by the President placed upon the retired list with the rank of brigadier general to date from June 7, the date of his retirement. He had personal effects to the amount allowed by Army Regulations for a colonel transported to his home at public expense when he was retired, and he requested a decision as to whether or not he was entitled to transportation of baggage to the amount allowed a briga-

dier general. The act of April 23, 1904 (33 Stat., 264), provided in part that—

"Any officer of the Army below the grade of brigadier general who served with credit as an officer or as an enlisted man in the Regular or Volunteer forces during the Civil War prior to April ninth, eighteen hundred and sixty-five, otherwise than as a cadet, and whose name is borne on the official register of the Army, and who has heretofore been, or may hereafter be, retired on account of wounds or disability incident to the service, or on account of age or after forty years' service, may, in the discretion of the President, by and with the advice and consent of the Senate, be placed on the retired list of the Army with the rank and retired pay of one grade above that actually held by him at the time of retirement."

Held, that said act conferred increased rank and pay only, but conferred no other right, and that the officer was not entitled to the additional allowance of a brigadier general in the transportation of his personal effects to his home.

(88-572, J. A. G., July 10, 1913.)

TAXATION: Instrumentalities of the Government; tax on deed and fees for recording same and for recording transfer of property.

An account was submitted for certain fees and taxes in connection with the transfer to the United States of a tract of land situated in Alexandria County, Va., said account consisting of a fee for recording the deed conveying the property to the United States, the State tax on said deed, and the fee of the commissioner of revenue for recording the transfer of the property on the property or assessment book of his district.

Held, that the recording of the deed was a governmental act for the protection of the title to the United States, and that the payment of the cost of the same could properly be made from the appropriation under which the land was acquired. *Held further*, that the State tax on the deed and the fee for recording the transfer of the property on the property or assessment book of the district were not expenses of the United States incurred for the protection of its interests, but were State taxes levied for the purpose of revenue upon an instrumentality of the State not subject to taxation under State laws, and that said items could not legally be paid from any funds under the control of the War Department.

(90-121, J. A. G., July 22, 1913.)

TRANSPORTATION: Army supplies in American vessels.

By act of April 28, 1904 (33 Stat., 518), it is provided that the transportation of supplies for the Army and Navy by sea shall be in vessels of the United States, or belonging to the United States, and no others, "unless the President shall find the rates of freight charges by said vessels are excessive and unreasonable, in which case contracts shall be made under the law as it now exists," etc.; and by section 3 of the act of April 29, 1908 (35 Stat., 70), it is provided that the "provisions of law restricting to vessels of the United

States the transportation of passengers and merchandise directly or indirectly from one port of the United States to another port of the United States shall not be applicable to foreign vessels engaging in trade between the Philippine Islands and the United States."

On the question raised as to whether the later act modifies the earlier act so as to permit the shipment of engineer material required for construction purposes to Manila in foreign vessels,

Held, that the earlier act is a special statute regulating the shipment of military or naval supplies, while the later act is an amendment of the general law regulating the coast trade; that under the well-established rule of construction that repeals by implication are not favored, and that a later statute, general in its scope, will not be construed as an implied repeal of an earlier special statute unless there be a clear intention to do so, the provisions of the earlier act are in no way modified by the later act.

(94-128, J. A. G., July 30, 1913.)

TRANSPORTATION: Baggage allowance on change of station; cost of packing for shipment.

The Auditor for the War Department suspended for further information a voucher in a disbursing officer's account covering the payment of the regulation amount for packing and crating for shipment for a lieutenant colonel of his full authorized allowance of personal baggage to be transported at public expense on change of station. Paragraph 1151, Army Regulations, 1910, provides that—

"The baggage to be transported at public expense, including mess chests and personal baggage, upon change of station will not exceed, when packed and crated the following gross weights: * * *

"Field officer, permanent change of station, 7,200 pounds.

* * * * *

"The maximum money allowance for packing and crating for each grade, exclusive of professional books and papers, will be as follows, and will not be exceeded. When less than the maximum allowance for each grade is transported, a proportionate decrease in the cost of packing and crating will be made. * * *

"Field officer, permanent change of station, \$43.20, * * *."

The voucher suspended was for the maximum money allowance for packing and crating the maximum allowance of baggage for an officer in the grade mentioned, excluding professional books and papers, for which no charge was made. The auditor required evidence of the actual amount of baggage packed and crated, and the original bill for labor and materials furnished for that purpose.

Held, that the regulation governing the allowance of personal baggage to be transported at public expense on change of station and the amount to be allowed for packing and crating the same for shipment was a limitation which the officer might not exceed either in the amount of baggage shipped or in the cost of packing and crating the same, and that only the actual amount of baggage shipped and not exceeding the allowance might be transported at public expense, and only the actual amount expended in packing and crating the same for

shipment, not exceeding the amount prescribed, might be paid for such purpose. It was therefore *recommended* that the officer should furnish a voucher showing the actual amount of baggage packed and crated, and that the same be supported by subvouchers covering the services performed and the materials furnished in packing and crating the same for shipment.

(94-412, J. A. G., July 17, 1913.)

TRANSPORTATION: Of Mexican prisoners; appropriation chargeable.

An account was submitted for the transportation of 1 officer and 43 enlisted men, and 237 Mexican prisoners from El Paso to Fort Bliss in the State of Texas. These prisoners had fled to the United States from a pursuing enemy in Mexico, where disturbed political conditions existed, and the United States authorities had interned them. The United States Government had not recognized a state of belligerency in that country, although it had recognized that conditions of violence existed there. *Held*, that under the circumstances, the expenses attendant upon caring for these prisoners must be met by the United States until such time as Mexico should make them good; *held, further*, that the expense of transporting said prisoners was properly chargeable to the appropriation for contingencies of the Army, and that an account should be itemized and reported to the State Department, in order that reimbursement might be requested of the Mexican Government at the proper time.

(94-342, J. A. G., July 9, 1913.)

TRANSPORTATION: Sleeping-car accommodation for a private soldier where first-class rail transportation was provided.

A depot quartermaster provided first-class transportation to a private soldier, not a noncommissioned officer, traveling alone under orders, no second-class transportation being available for the journey, and in connection therewith provided one upper berth in a tourist sleeping car for a part of the journey. Paragraph 1143, Army Regulations, 1910, provides that—

“* * * when the number of troops is too small to justify the hiring of tourist sleepers, second-class transportation with tourist sleeping-car accommodations on the same basis may be furnished. When the number is less than three, each man will be furnished with a berth.”

On May 14, 1912, the Quartermaster General of the Army issued instruction which effectually prohibited the furnishing of sleeping-car accommodations, either standard or tourist, to enlisted men not noncommissioned officers, where first-class transportation is provided.

Held, that these instructions of the Quartermaster General were not in conflict with the regulation, which did not forbid the furnishing of sleeping-car accommodations under such conditions, and that the depot quartermaster having provided such sleeping-car accommodations contrary to said instructions, should refund the amount charged for the same in order that the account might be settled.

(94-240, J. A. G., July 15, 1913.)

TRAVELING EXPENSES: Army officers on civil business as members of a commission; appropriation chargeable.

Joint resolution No. 40 of August 9, 1912 (37 Stat., 641), directed the Secretary of War to cause an investigation to be made of the claims of American citizens and others domiciled in the United States for certain injuries received within the boundaries of the United States from the operations of Federal or insurgent troops of Mexico in the course of the insurrection in that country during the year 1911. For the purpose of such investigation the resolution authorized the Secretary to appoint "a commission of three Army officers," which commission was given authority to subpoena witnesses, administer oaths, etc., and was required to report to Congress through the Secretary of War its findings of fact upon each claim, together with its conclusions as to the justice and equity thereof, and as to the proper amounts of compensation or indemnity to be paid. Subsequently the sum of \$5,000 was appropriated by Congress "to carry out" the provisions of said resolution.

Held, that for travel performed under orders by members of said commission in connection with its business, only mileage and not actual traveling expenses could be paid to said officers, and that the accounts should be submitted to the Auditor for the War Department upon that basis. *Held further*, that the mileage should be paid from the special appropriation made for the payment of the expenses of the commission.

(94-210, J. A. G., July 23, 1913.)

VOLUNTARY SERVICES: Payment for repairs of railroad siding belonging to the Government.

A railroad side track belonging to the Government and located upon a Government military reservation was in bad condition, and the railroad company with whose lines it connected repaired the same without any request by, but without objection from, the military authorities.

Held, that as the work was voluntarily rendered, and as there was no contract either express or implied upon the part of the Government to pay for the said repairs, there was no authority for making payment for the services rendered.

(76-030, J. A. G., July 15, 1913.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

APPROPRIATIONS: Heating and plumbing fixtures; Public buildings.

By act of August 24, 1912 (37 Stat., 582), the sum of \$10,000 from the appropriation for "Barracks and quarters" was authorized to be expended for the construction of a building for instruction purposes for the post of Fort Leavenworth, Kans.; and by act of March 4, 1913 (37 Stat., 865), an additional amount of \$5,000 was appropriated for

the same purpose. On the question raised as to whether the cost of installation of plumbing and heating apparatus and electric wiring in such building is a proper charge against the appropriation for the construction of the building or whether the plumbing should be charged to the appropriation "Water and sewers at military posts" and the heating apparatus and electric wiring fixtures to the appropriation "Regular supplies," as is the case with respect to other buildings provided for under the appropriation "Barracks and quarters," the Comptroller referred to the item under the heading "Regular supplies" (act of March 2, 1913, 37 Stat., 712), providing "for furnishing heat and light for the authorized allowance of quarters for officers and enlisted men * * * and for recruits, guards, hospitals, storehouses, offices, * * *" and to the item in same act under the heading "Water and sewers at military posts," providing "for the installation and extension of plumbing within buildings *where the same is not specifically provided for in other appropriations, * * **" and held as follows:

(a) That as a general rule all those parts of a building which are in their nature fixtures and which would be included in a transfer of the ownership of the building are regarded as a part of the building itself; and the cost of such fixtures, if placed therein at the time the building is in process of erection, is payable from the appropriation for the erection of the building in the absence of some other appropriation making more specific provisions therefor. (See MS. Comp. Dec. 561, dated Feb. 28, 1899; 18 Comp. Dec., 612.)

(b) That the appropriation for "Water and sewers at military posts" provides expressly that the cost of installation of plumbing in buildings shall be paid therefrom unless the same is specifically provided for in other appropriations; and that as the appropriation for the building does not provide specifically for the installation of plumbing therein, the cost of plumbing in said building should be charged to the appropriation for "Water and sewers."

(c) As to the installation of the heating apparatus and electric wiring and fixtures, there being no appropriation making more specific provision therefor than the appropriation for the construction of the building, the cost of their installation should be charged to the appropriation for the construction of the building.

(Asst. Comp. W. W. Warwick, July 29, 1913.)

CONTRACTS: Delays in performance.

A contract with the Government provided for the improvement of navigation by dredging and rock removal within an area in the Harlem River, New York. The specifications attached to and forming a part of the contract contained the statement that approximately 1,650 cubic yards of ledge rock were required to be removed. In the prosecution of the work it was necessary to remove a total of 2,914.7 cubic yards of such material in order to excavate to the required depth, the difference causing a delay of four and two-thirds months beyond the time for the completion of the work. The discrepancy between the amount of ledge rock named in the specifications and the amount

necessary to remove was caused by the fact that the rock surface was very irregular and overlaid with hard material so that it was impossible to determine its surface by the ordinary methods of rod boring. The quantities given in the specifications were only approximate and were expressly stated to be but an estimate, and the contract and specifications contained a provision that bidders were expected to examine the work and to decide for themselves as to its character and make their bids accordingly, as the United States did not guarantee the accuracy of the description. Another paragraph of the specifications provided that—

“No allowance will be made for the failure of a bidder or of a contractor to estimate correctly the difficulties attending the execution of the work.”

It was further provided that no charge for inspection or superintendence would be made, after the expiration of the contract for time lost—

“On account of the unusual freshets, ice, rainfall, or other abnormal forces or violence of the elements * * * or other unforeseeable cause of delay arising through no fault of the contractor and which actually prevented such contractor from commencing or completing the work * * * within the period required by the contract.”

Held, that a statement of the approximate quantities of material set out in the specifications was distinctly not a warranty but at most a mere estimate (*Griefen v. United States*, 43 Ct. Cls., 107), and the fact that there was more ledge rock to remove than either the contractor or the Government had expected was not an unforeseeable cause of delay within the meaning of the contract. *Held, therefore*, that the contractor should be charged with all the cost of inspection, etc., for delay beyond time for completion occasioned by the necessity for the removal of the quantity of ledge rock above the amount mentioned in the specifications.

(Asst. Comp. W. W. Warwick, June 30, 1913.)

CONTRACTS: Where Government assists contractor who is not in default.

A contract for levee work provided that the price per yard should include all costs for clearing the foundation. After clearing the foundation the work was delayed by excessive rains; and in order to expedite the work in view of approaching floods and without awaiting any default or delinquency on the part of the contractor, the contracting officer, with the assent of the contractor, placed a quantity of materials on the site cleared by the contractor at a cost of \$357.27 less than the amount which the contractor would have received for the same quantity of materials under the terms of the contract. *Held*, that the contract, as modified by the contractor's agreement that the Government should aid in the work, should be interpreted so as to give him the contract rate per yard for all materials placed in the work, deducting therefrom the cost to the Government for the work done by it.

(Asst. Comp. W. W. Warwick, July 7, 1913.)

TRANSPORTATION: Baggage of officers traveling on a mileage basis.

On appeal from a decision of the Auditor for the War Department disallowing, *inter alia*, a claim of an officer serving as military attaché abroad for reimbursement for the amount paid by him for the transportation of his baggage, while traveling on official business on a mileage basis, *held*, that mileage is an allowance in the nature of a reimbursement for the expenses of travel incurred by an officer traveling under competent orders on public business; that the mileage law (Act of June 12, 1906, 34 Stat., 246) expressly provides "That hereafter officers * * * when traveling under competent orders without troops * * * shall be paid 7 cents per mile and no more * * *"; that the mileage so authorized is intended to and does cover every ordinary and reasonable expense of travel, including any cost of transportation of personal baggage, such as an officer usually traveling in a mileage status usually carries with him; that to allow the claim in question would be to give the officer more than 7 cents a mile, contrary to the provision of the statute; and that the regulations authorizing such allowance (pars. 1137 and 1153, Regulations 1910) are directly contrary to the statute and without legal force or effect.

(Asst. Comp. W. W. Warwick, July 29, 1913.)

TRANSPORTATION: Hire of automobiles; use of by the Secretary of War and Army officers for field inspection.

Vouchers were presented for automobile service furnished to the Quartermaster's Department in connection with a field inspection at Pole Mountain, Wyo., by the Secretary of War and a party of Army officers accompanying him, under authority of a telegram from the Quartermaster General dated August 28, 1912. The vouchers had been paid from the appropriation for the transportation of the Army. The Army appropriation act of August 24, 1912 (37 Stat., 583), under head of "Transportation of the Army and its supplies," provides:

"For the purchase, hire, operation, maintenance and repair of such harness, wagons, carts, drays, and other vehicles as are required for the transportation of troops and supplies, and for official, military, and garrison purposes."

Said provision first appeared in the Army appropriation act of March 3, 1911 (36 Stat., 1051), for the fiscal year 1912, and in addition said act contained the following provision:

"That hereafter in the performance of their official and military duties the officers of the Army are authorized, under such regulations as may be established by the Secretary of War, to use the means of transportation herein provided for."

Held, that the law provided for the hiring of the vehicles in question, and permitted their use by Army officers for official and military purposes, and that the fact that the Secretary of War also rode in the automobiles did not affect the legality of the transaction. *Held*, therefore, that the vouchers might be paid.

The question of whether the Secretary of War could be considered as a part of the Army while engaged on this duty was not decided, as a decision upon that point was not considered necessary.

(Asst. Comp. W. W. Warwick, July 18, 1913.)

TRANSPORTATION: Land-grant deductions; basis of deduction.

A railway company appealed from a decision of the Auditor for the War Department disallowing a certain amount of its bill for transportation of coal from Roslyn, Wash., to Fort Stevens, Oreg., on account of land-grant deduction, claiming that the Auditor erred in including certain land-grant mileage twice.

In the division of the through rate of \$2.80 per ton for said shipment between said points, \$2 per ton accrued between Roslyn, Wash., and Willbridge, Oreg., to the Northern Pacific Railway, which was subject to the land-grant deduction on the basis of land-grant mileage between said points, and that 80 cents per ton accrued between Willbridge and Fort Stevens, Oreg., to the claimant company, which was subject to land-grant deduction on the basis of land-grant mileage between said points on account of using the land-grant mileage of the Northern Pacific Railway Co.

Held, that where transportation is authorized by a route which requires the double use of the same track, each use of which is a different part of the through service and for which a separate division of the through rate is authorized, land-grant deduction should be made on the ratio of the land-grant mileage to the total mileage involved in each separate division of the through rate, though the same mileage is used as parts of different divisions. (18 Comp. Dec., 309.) The Auditor's disallowance was sustained.

(Comp. Geo. E. Downey, July 24, 1913.)

OPINION OF THE ATTORNEY GENERAL.

(Digest prepared in the office of the Judge Advocate General.)

PROMOTIONS: Of Army officers by seniority.

The act of October 1, 1890 (26 Stat., 562), provides:

"That hereafter promotion to every grade in the Army below the rank of brigadier general, throughout each arm, corps, or department of the service shall, subject to the examination hereinafter provided for, be made according to seniority in the next lower grade of that arm, corps, or department: *Provided*, That in the line of the Army all officers now above the grade of second lieutenant shall, subject to such examination, be entitled to promotion in accordance with existing laws and regulations."

Section 3 of the same act authorizes the President to prescribe a system of examination of all officers of the Army below the rank of major to determine their fitness for promotion, and provides that if any officer fails to pass a satisfactory examination and is reported unfit for promotion, the officer next below him in rank having passed said examination shall receive the promotion.

The President submitted, for opinion, the questions of whether the provisions of the act of October 1, 1890, that promotions in the Army below the rank of brigadier general shall, subject to the examination required therefor, be made according to seniority in next lower grade, made it mandatory upon the President to appoint the senior officer in the grade of major to a vacancy in the grade of lieutenant colonel, if, in his opinion, the record of the officer indicated

that he was disqualified for the promotion, and he could not be eliminated either through the agency of a retiring board or a court-martial; and whether if such statute be so construed it would not be an unauthorized encroachment upon the appointing power of the President, and should for that reason be held to be advisory in character.

Held, that by section 2, Article II, Constitution of the United States, which deals with the power of the President to make appointments, when Congress creates an office, but does not vest the appointment thereto in any of the persons specified in said section, the Constitution operates *proprio vigore* and immediately casts upon the President by and with the advice and consent of the Senate the duty of appointing thereto; that the power of appointment involves the exercise of a discretion not to be entirely controlled by Congress; and that the fact that Congress is given the power by the Constitution "to make rules for the government and regulation of the land and naval forces" does not enable it to control the President's discretion in respect of those appointments which the Constitution requires him to make. *Held further*, that the act of October 1, 1890, did not make it obligatory upon the President to promote the senior officer in the grade of major when a vacancy existed in the grade of lieutenant colonel, if, in his opinion, the record of the officer had been such as to indicate that he was disqualified for the promotion.

(Atty. Gen. J. C. McReynolds, June 23, 1913.)

BULLETIN 29.

**BULLETIN }
No. 29. }**

**WAR DEPARTMENT,
WASHINGTON, September 10, 1913.**

The following digest of opinions of the Judge Advocate General of the Army for the month of August, 1913, including one opinion for July, 1913, not heretofore published, and of certain decisions of the Comptroller of the Treasury and of opinions of the Attorney General and of one court decision, is published for the information of the service in general.

[2054671 A.—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

H. O. S. HEISTAND,
Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ABSENCE ON SICK LEAVE: Status of officer on sick leave without any regular station.

An officer of the Medical Reserve Corps who was ill with heart trouble was transferred from Benicia Arsenal, Cal., to the Letterman General Hospital. It became necessary to replace him at the arsenal by another medical officer and, owing to the limited accommodations for officers at that station, to relieve him from further duty to make room for the family of his successor. No orders were issued assigning him to a new station. He requested that, unless the order relieving him from duty at the arsenal entitled him to commutation of quarters, thereafter quarters be provided in San Francisco for his family, which had been occupying the quarters assigned to him at Benicia Arsenal; that his household goods and two private mounts at Benicia Arsenal be shipped by the quartermaster to the Letterman General Hospital; and that some quartermaster in the neighborhood be authorized to issue forage for said mounts after their arrival.

Held, that this officer's status was that of an officer who had been relieved from duty at his station without an assignment to a new station, and was analogous to that of an officer on sick leave without any regular station, and that hence he was not entitled to commutation of quarters; that there was no authority of law or regulations under which shipment of his household goods and private mounts could be made as requested, nor could forage be furnished under his present status; and that in view of the fact that he had

been or sick report since March 5, 1913, that his disability was regarded as permanent, and that at last report he was not able to leave the hospital, no order could properly be issued assigning him to a new station for the purpose of giving him the allowances requested.

(72-333, J. A. G., Aug. 6, 1913.)

BAGGAGE: Change of station allowance of, of officer assigned to his regiment prior to the expiration of the four-year period of his detail with higher rank in a staff department.

A first lieutenant of the Coast Artillery Corps was detailed for a period of four years as captain in the Ordnance Department. He was relieved and assigned to a company of the Coast Artillery Corps to take effect on a date prior to the expiration of the four-year period of his detail. The question arose as to whether he was entitled to the change of station allowance of baggage of a captain or of a first lieutenant upon his personal property shipped by the Quartermaster's Department on the date said assignment took effect.

Held, that he resumed his rank of a first lieutenant on that date and would be entitled to the authorized change of station allowance of baggage of a first lieutenant only.

(94-233, J. A. G., Aug. 16, 1913.)

COMPTROLLER OF THE TREASURY: Final authority in the decision of all questions on accounting.

The question raised was whether the Comptroller in construing a statute authorizing the expenditure of public funds could annul Army regulations made in pursuance of the express terms of an act of Congress, or, in other words, whether his authority was sufficient to nullify an existing and public regulation of the President of the United States for the guidance and control of the Army. It was urged that under such a situation any officer, although he might observe regulations with exactness, might find himself ruined financially through some such decision when in emergency he had large affairs to negotiate.

Held, that it is well settled that the Comptroller as the law officer of the accounting officers is vested by law with final authority to decide all questions upon accounting properly submitted to him, and to construe all statutes upon the authority of which disbursements of public funds are made, and that appeal from action taken by him in matters that fall under his jurisdiction lies only to the courts; that as he is the depository of final authority to construe all statutes under which disbursements of public funds are made, it necessarily follows that if his construction of such a statute should bring it into conflict with a departmental regulation, said construction would nullify the regulation.

(72-311, J. A. G., Aug. 23, 1913.)

CONTRACTS: Claim for services rendered in excess of what can be shown under the contract.

A contract for supplying electric current to the United States required the contracting company to furnish, maintain, and read watt meters, and provided that "in case of failure of any meter during any month the monthly consumption" for that month "will be found by adding the consumption of the previous month to the consumption for the following month, dividing the sum by two"; and that "all meters will be calibrated at reasonable intervals to insure their accuracy." The company claimed payment for current supposed to have been used in excess of that shown by the meter readings between January, 1912, and the last of February, 1913, when the meter was rewired and calibrated, it appearing from a comparison of the amount of the current used before and after the correction of the meter with the amount of work done that the meter registered only about 64 per cent of the current actually used. It is stated that the cost of the operation of the plant under the erroneous readings of the meter is approximately what the company previously claimed it could be operated for; and that had it been known to the proper officer that the meter was inaccurate, and that the Government was consuming so much larger an amount of current than was originally anticipated, steps would have been taken to have the contractor comply with the requirements of the contract relative to the proper adjustment of the meter, and to reduce current consumption in order that the plant might be operated more economically.

Held, that as the contract provided for payment according to meter measurement, except as expressly stipulated therein, and imposed upon the company the duty of furnishing the meters and having them corrected at reasonable intervals to insure their accuracy; that as the Government had made payments in accordance with the meter readings and since, if the claim of the company should be allowed, the Government would have suffered through the laches of the company, the claim should be disallowed; that the department should take the position that under the terms of the contract it is only bound to pay the company according to the meter readings except as specifically stated therein, and that the company is estopped by its own laches as well as by the terms of the contract from showing that the readings were inaccurate.

(76-741, J. A. G., Aug. 12, 1913.)

CONTRACTS: Damages for delay in completion of work.

A contractor for electrical installation submitted a claim for an amount withheld from the final vouchers under his contract as damages for delay in completion of the work beyond the date fixed in the contract. The amount deducted represented the difference in cost to the Government in operating the old acetylene gas lighting system and the new electric lighting system from January 1, 1913, the date of expiration of the contract, to March 28, 1913, the date upon which the work was completed. The deduction was made upon the

findings of the constructing quartermaster that the company was not ready to commence the installation of electric fixtures until January 1, 1913, and the Chief of the Quartermaster Corps stated further that it appeared to be indisputable that this contractor could not have completed his contract sooner than March 28, 1913, even if current had been available on November 1, 1912, instead of January 23, 1913. The company disputed these statements, insisting that it was ready to install fixtures December 1, 1912, submitting freight receipts showing that a large quantity of fixtures were on hand on that date, and that it could have completed the work within the contract period had the current been delivered on time. It appears that the current was not furnished until January 23, 1913, and that it was not practicable under the contract to commence the work of installation until the current was available.

Held, that as the current was not furnished until January 23, 1913, the contractor could not be charged with the damages in question on the doubtful finding that even if the current had been available the work could not have been completed sooner than March 28, 1913, and advised that the amount deducted on the final vouchers should be paid to the contractor.

(76-620, J. A. G., Aug. 8, 1913.)

CONTRACTS: Deductions to cover loss or damage sustained by the United States by reason of delay in completion.

On June 22, 1912, a contract for furnishing and installing one motor-driven triplex pump, with foundation, etc., was signed. This contract, which contained a provision that the work specified therein should commence on or before June 30, 1912, and be completed on or before November 6, 1912, and a further provision making the contract subject to the approval of the Quartermaster General (now Chief of the Quartermaster Corps), was not approved until November 1, 1912, on which date there was also approved a supplementary contract extending the time limit for completion of the work from November 6, 1912, to January 6, 1913. The work was not completed until May 24, 1913. Upon payment being made there was deducted the cost of superintendence and inspection from January 7 to May 24, 1913, and the cost to the United States of the coal used during that period over what would have been used had the contractors completed their work on January 6, 1913. The contractors claimed that the deduction instead of covering the period from January 7 to May 24, should cover only the period from March 18 to May 24, alleging that as in the original contract the date of completion was set 137 days after the date of signing the contract they were in equity entitled to 137 days after the delayed approval of the contract in which to complete the work, which would fix March 17, 1913, as the date of completion.

Held, that the supplementary contract, extending from November 6, 1912, to January 6, 1913, the time of completion specified in the original contract, was made at a time when there had already been long delay in the approval of the original contract; that it was no doubt in view of this delay and of the causes which led to this delay that the parties entered into the supplementary contract in which

it was agreed that the work should be completed on or before January 6, 1913; that although at the time of entering into this supplementary agreement the contractors might perhaps reasonably have urged that they should be granted as many days from the date of approval of the original contract as was allowed in the first instance between the date upon which the work was to be begun and the date upon which it was to be completed, no such provision was incorporated into the supplementary agreement; and that the joint effect of the two instruments, original and supplementary, was definitely to fix January 6, 1913, as the ultimate date of completion and to make the contractors chargeable with any loss or damage sustained by the United States after that date by reason of the contractors' failure to complete the work on or before that date.

(76-741, J. A. G., Aug. 18, 1913.)

CONTRACTS: Impossibility of performance, due to act of God.

A firm of contractors contracted to deliver to the United States at Kansas City, Mo., or at points in the vicinity of Yates Center, Kans., 1,500 tons of "Kansas upland prairie hay" during the months of August and September, 1913, for shipment to the Philippine Islands. There was a shortage of the hay crop due to a drought in the vicinity where it was contemplated by the contract that the hay of the kind required would be procured, so that the contractors were unable to make deliveries in accordance with the requirements of their contract. On the question submitted as to whether the contract could legally be canceled.

Held, that if, by reason of a drought in that vicinity, the contract had become impossible of performance according to its terms, as distinguished from simply more difficult to perform, the contractors were legally released from the performance of their contract; that the contract in calling for "Kansas upland prairie hay" might be construed as conditioned on the existence of a crop of such hay; and that if, by reason of drought, there was no such hay procurable the contract could not be performed according to its terms and the contractors would be legally relieved on the ground of impossibility of performance according to the terms of the contract. See Digest J. A. G., 1912, p. 335, X C.

(76-600, J. A. G., Aug. 13, 1913.)

DETACHED SERVICE: Status of officer assigned to special duty as instructor of regimental recruits.

A second lieutenant of Troop L, Fifth Cavalry, served as instructor of recruits belonging to that regiment. While on that duty said lieutenant had under his instruction from 7 to 25 recruits belonging to Troop L, and in addition thereto the recruits belonging to the other three troops of the third squadron, Fifth Cavalry. These recruits were formed into separate detachments only when at drill, at which time they came under the immediate authority and supervision of said lieutenant as instructor of recruits; but in respect of administration, discipline, quarters, and subsistence each recruit was dealt with as a member of the troop to which he had been assigned.

While serving as instructor of said recruits said lieutenant performed his duties under the immediate orders of the regimental commander; was excused from all other duties; was not subject to the orders of the commanding officer of Troop L, or any other troop; and was carried on troop and regimental returns as on special duty drilling recruits. The question submitted was whether or not said lieutenant, while in the performance of the duty above described, was actually present for duty with a troop of Cavalry within the meaning of the detached service legislation of August 24, 1912 (37 Stat., 571, 645), the question being accompanied by the suggestion that as the recruits placed under the lieutenant's instruction always included a number belonging to the troop to which he was assigned, his case is within the purview of paragraph 8, General Orders No. 44, War Department, 1912, which reads as follows:

"An officer actually on duty with a detached portion of his troop, battery, or company is to be regarded as actually present for duty with his organization."

Held, that to make the foregoing rule applicable the officer's relation to the detached portion of the troop must be incidental to and must flow from his relation to the troop itself (J. A. G. O., 6-124, Nov. 18, 1912; Bulletin No. 4, War Department, 1913, p. 8); that this lieutenant did not exercise authority over the recruits of Troop L because of a common relation to said troop; that his duty relations with said troop had been terminated for the time being; that the authority he intermittently exercised over L troop and other recruits was exercised in pursuance of the orders of his regimental commander; that in so far as these recruits constituted a detachment in any sense they were a detachment of the regiment or squadron and not of Troop L; that the status of this lieutenant was that of an officer detached from his troop and assigned to the special duty of drilling recruits belonging to the squadron, who were assembled daily for that particular purpose; that the mere fact that some of the recruits under his instruction at daily recruit drill came from the troop to which he stood formally assigned at the time could not serve to make his performance of duty with this body of recruits duty with his troop or a detached portion thereof in the sense of the detached-service legislation (J. A. G. O., Jan. 15, 1913; Bulletin No. 4, War Department, 1913, pp. 6 and 7); and that, therefore, while in the performance of the duty above described, he was not actually present for duty with a troop of cavalry or a detachment thereof within the meaning of the detached-service legislation of August 24, 1912. (6-124, J. A. G., Aug. 14, 1913.)

DISCHARGE OF SOLDIER: Under a seven-year enlistment, by purchase or on account of the dependency of his parent; can he be recalled to active service?

The question submitted was whether in the case of a soldier enlisted for a term of seven years now prescribed by law, a discharge by purchase or on account of the dependency of a parent would serve to relieve the soldier from the liability to be recalled for active service which rests upon a soldier furloughed to the Army reserve. Both the act which authorizes his discharge by purchase (Sec. 4, act of

June 16, 1890, 26 Stat., 157) and the act which authorizes discharge on account of the dependency of a soldier's parent (sec. 30, act of Feb. 2, 1901, 31 Stat., 756) provide for the complete separation of a discharged soldier from the military service. Section 2 of the act of August 24, 1912 (37 Stat., 590), which section prescribes a seven-year term of enlistment and provides for the establishment of an Army reserve contains a proviso to the effect—

"That except upon reenlistment after four years' service or as now otherwise provided for by law, no enlisted man shall receive a final discharge until the expiration of his seven-year term of enlistment, including his term of service in the Army Reserve, * * *."

Held, that the effect of the language "or as now otherwise provided for by law," as employed in the statute prescribing the seven-year term of enlistment and providing for the establishment of an Army reserve, is to continue in force in respect of the soldier who enlists under the terms and conditions prescribed in that statute, the provisions of the acts of June 16, 1890, and February 2, 1901, relating to discharge by purchase or on account of the dependency of a parent, and that a discharge by purchase or on account of the dependency of a parent granted to a soldier enlisted for the term of seven years now prescribed by law accomplishes a complete separation of the soldier from the service and therefore relieves him from any liability to be recalled for active service during the unexpired portion of the seven-year term for which he had been enlisted.

(6-300, J. A. G., Aug. 15, 1913.)

DISCIPLINE: Disease the result of a soldier's own misconduct; can he be brought to trial and punished for failure to disclose the fact that he is suffering therefrom?

The question submitted was whether a soldier might properly be brought to trial and punished for failing to disclose the fact that he was suffering from a venereal disease, in view of the fact that such disclosure might subject him to loss of pay, under the provisions of the Army appropriation act of March 2, 1913 (37 Stat., 706), or subject him to trial pursuant to the provisions of General Order No. 17, W. D., 1912. The said act of March 2, 1913, which repeats in substance a similar provision in the Army appropriation act of August 25, 1912 (37 Stat., 572), provides in effect that no officer or enlisted man shall receive pay from the appropriations therein contained for time while absent from active duty on account of sickness resulting from his own intemperate use of drugs, or alcoholic liquors, or other misconduct. This office held in an opinion dated January 31, 1913, that General Order No. 17 could not be made the basis for the punishment of a soldier for disobedience of its provisions, even though brought to his attention; that the order was addressed to commanding officers and imposed upon them the duty of requiring enlisted men to observe the sanitary precautions mentioned; and that in order to render enlisted men liable to punishment pursuant to said order, special instructions should be issued by commanding officers, requiring soldiers to observe the prescribed precautions. In the case under consideration post orders were issued requiring compliance

with the terms of said General Order No. 17, and under the terms of said orders a soldier failing to report himself for the preventive treatment therein provided for, after exposure to the danger of contracting venereal disease, becomes subject to trial by court-martial for such failure, if it afterwards develops that he became infected through such exposure. After the publication of the post orders the existence of a venereal disease became a material part of the offense for which the soldier might be punished, and which must be proved in order to make out the offense.

Held, that an enlisted man could not legally be punished for failing to disclose facts which would amount to a confession or an admission of an offense for which he might be punished, or which might amount to an admission of a material fact constituting a portion of such offense; that the punishment of a soldier for failing to disclose his condition in cases like the one under consideration would amount to an infliction of a punishment for failure to volunteer material evidence against himself; that it would not be a violation of his rights to compel the soldier to submit to a proper examination to determine whether or not he was suffering from venereal or other disease; but that no soldier should be brought to trial for not disclosing his condition in that respect.

(72-210, J. A. G., Aug. 5, 1913.)

EIGHT-HOUR LAW: Do deck hands and stokers on Government vessels come within its provisions?

Five deck hands and one stoker employed on dredges engaged in river and harbor improvements were dismissed because they refused to render additional service of two hours each per day in order to relieve overworked watchmen. Complaint was made that said employees were dismissed for refusing to work 10 hours per day, in alleged violation of the eight-hour law of March 3, 1913 (37 Stat., 726), which reads in part as follows:

"That the service and employment * * * of all persons who are now, or may hereafter be, employed by the Government of the United States or the District of Columbia, or any contractor or subcontractor to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia is hereby limited and restricted to eight hours in any one calendar day; and it shall be unlawful * * * to require or permit any such * * * person employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, to work more than eight hours in any calendar day, except in case of extraordinary emergency: *Provided*, That nothing in this act shall apply or be construed to apply to persons employed in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia while not directly operating dredging or rock-excavating machinery or tools * * *."

Held, that in view of the decision of the Supreme Court in the case of *Ellis v. United States* (206 U. S., 246), that crews of tugs,

scows, and dredges were not laborers or mechanics within the meaning of the eight-hour law of August 1, 1892 (27 Stat., 340), but belonged in the distinctive class of seamen, deck hands, and stokers employed upon dredges, being a part of the crews of the dredges, must also be placed under the same classification; that under the terms of the act of March 3, 1913, *supra*, they could not be considered as persons employed to perform services similar to those of laborers or mechanics in connection with dredging, as there was, legally speaking, no similarity between such services; and that the law, having sharply distinguished the crew from laborers and mechanics, had by the same token distinguished between the services of the two classes, and, furthermore, that the proviso of said act limiting its application to persons employed and directly operating dredging or rock-excavating machinery or tools excluded from the benefits of the act all persons not so employed, including deck hands and stokers.

Held, further, that for the reasons given the district engineer officer had authority to require deck hands and stokers of the crews of dredges employed by him to remain on the dredges for more than eight hours in a calendar day, and that he was legally justified in dismissing those deck hands and stokers who refused to obey his directions.

(32-221, J. A. G., Aug. 29, 1913.)

EIGHT-HOUR LAW: Telegraph operators not laborers or mechanics.

Upon the question submitted as to whether a telegraph operator is a laborer or mechanic within the meaning of the eight-hour statute,

Held, that it may be said without hesitation that he is not a mechanic; that, as his manual labor is attended by a far greater amount of technical skill and brain exertion, he may be considered not as one who labors principally with his physical powers, but as one whose services consist mainly of work requiring mental skill; that the element of mental skill and brain power so largely enters into his work that the term "laborer" used in the law does not apply to him, and that he is not, therefore, either a mechanic or a laborer within the meaning of the eight-hour statute.

(32-223, J. A. G., Aug. 13, 1913.)

MILITARY RESERVATIONS: Right of the United States to require a telegraph company to remove its pole line from an avenue which had formerly extended through lands now occupied by the reservation and which was subsequently closed.

A municipality had granted to a telegraph company a franchise to extend a telegraph line along an avenue of the city, which avenue adjoined on one side a military reservation and marked the limits of the reservation in that direction. Subsequently the United States acquired a tract adjoining this avenue on the other side thereof from the reservation for an addition to the reservation, upon which the old avenue was closed and a new avenue was opened up

alongside of the new boundary of the reservation and extending in the same direction. Upon the question as to the legal right of the Government to compel the removal of this telegraph pole line from the site formerly occupied along the old avenue,

Held, That the granting of a franchise or a right to occupy a public road for the purpose of a telegraph line did not give to the grantee the right to occupy the land after the public road has been discontinued by lawful authority; that the municipality in this case had no authority to grant an easement over the land covered by the roadway but only, and no more than, a license to occupy the road so far as the public use of the same was concerned, and that when the road was discontinued the land reverted to the owners relieved of the public easement or right of way over the same, and the incidental franchise or right of the telegraph company to occupy the roadway with its line terminated; that the municipality could grant no greater title than it had or controlled; and that any rights or franchise which it might grant in the road or highway was subordinate to and limited by the extent of the public easement; that the right to locate upon a public road was an additional burden to the land; and that the legislature, under the constitution of the State, had no power to grant to the municipal authorities the right to burden the fee with this additional easement without the consent of the owner thereof. (*Postal Tel. & Cable Co. v. Eaton*, 170 Ill., 513.)

(80-621, J. A. G., July 22, 1913.)

MILITIA: Equipment of, on basis of war strength.

The major general of the New York National Guard recommended that the war material necessary to equip the National Guard of New York on a war strength in that State be issued, and stated that, if there should be legal objection to the supply by the War Department of the property involved without charging the same against the State's allotment of Federal funds, the War Department might legally ship (not issue) such property to certain indicated supply depots or storehouses, consigned to a Federal or State supply officer for the purpose of storage only.

Held, that there was no authority of law for the issuance of United States arms, accouterments, and equipments to the militia in excess of that sufficient to arm and equip the organized part of such militia as provided under section 13 of the act of January 21, 1903 (32 Stat., 777); that the Government might arm and equip that part and no more, and that the issue of additional supplies would not be warranted under the statute; *held further*, that there was no authority by which an officer accountable for Government property could transfer such accountability to another person not authorized by law to receive the same, and hence the shipment of arms, equipments, etc., in addition to those authorized under the act of January 21, 1903, to an officer of the militia even without formal issue would be without authority; that if the shipment was made to a Federal

officer at several different points in the State as suggested he would remain responsible and accountable for the property without being able to exercise proper care and control over the same; and that such disposition also of War Department property could not legally be made.

(80-120, J. A. G., Aug. 13, 1913.)

MOUNTED OFFICERS: Sufficiency of mount.

A captain of Cavalry was the owner of a mount which fulfilled all the conditions for a suitable mount required by General Order 125, War Department, 1908, and also fulfilled all the conditions, except as to height, for a suitable mount, as mentioned in General Order 29, War Department, 1911. The officer appeared to have purchased the mount before the receipt of the general orders last mentioned at the Army post where he was serving and where he was in command of the post.

Held, that if the officer before the receipt of said General Orders, No. 29, purchased the horse and, as commanding officer of the post, passed it as a suitable mount under General Order 125, he was entitled to pay as an officer furnishing his own mount, since General Order 29 continued the eligibility of a horse previously declared suitable for a mount.

(72-142, J. A. G., Aug. 14, 1913.)

PAY OF ARMY: Deduction for absence from duty without proper authority; acting dental surgeons.

The act of March 3, 1911, creating the Dental Corps in the Medical Department, provides:

"Hereafter there shall be attached to the Medical Department a dental corps, which shall be composed of dental surgeons and acting dental surgeons, * * *. All original appointments to the dental corps shall be as acting dental surgeons, who shall have the same official status, pay, and allowances as the contract dental surgeons now authorized by law. * * *"

Contracts between the Surgeon General and acting dental surgeons contained the following provision:

"The said Surgeon General, U. S. Army, promises and agrees, on behalf of the United States, to pay, or cause to be paid, to the said ———, A. D. S., the sum of one hundred and fifty dollars a month during the continuance of this contract, both when on duty and when absent therefrom by proper authority."

An acting dental surgeon was reported absent from duty on sick report because of a disease contracted through his own misconduct and not in line of duty.

Held, that absence from duty under the conditions stated could not be characterized as absence "by proper authority," and that under the terms of his contract the acting dental surgeon was not entitled to pay during the period of such absence.

(6-227.3, J. A. G., July 28, 1913.)

PUBLIC PROPERTY: Army stores awaiting shipment in a railway freight depot destroyed by fire.

Stores belonging to the United States were delivered by various dealers in Boston to a certain railroad with instructions that the dealers take shipping receipts to be indorsed "Government bill of lading to follow for each consignment to each post." The bill of lading for all the stores in question was made out by the quartermaster and mailed to the railroad agent during the afternoon of February 26, 1913. The stores were destroyed by fire in the freight depot that night at 11.45 p. m. The railroad company claims that the receipts show that the shipment was delivered to the railroad a number of days prior to the fire and was held in the freight house pending receipt of the Government bill of lading; that the articles composing this shipment came from various concerns in the city with notations on their shipping receipts that they be held for the Government bill of lading; that the goods were held by the railroad not as a common carrier but as a warehouseman, as they were not actually in transit or ready to go forward.

Held, that if the shipment could not have been made without this bill of lading and if it was not received by the railroad company before the fire, the liability of the company would be that of a warehouseman and not that of a common carrier; that in that case the company would be liable only for negligence or the want of ordinary care of the property, and the burden would rest upon the plaintiff to prove the negligence; that on the other hand if it was incumbent upon the railroad company to have shipped these stores without waiting for the bill of lading, or if it could be shown that the bill of lading reached the railroad agent before the fire, then the liability of the railroad company would be that of a common carrier responsible for the full value of the goods which were destroyed.

(80-013. J. A. G., Aug. 20, 1913.)

PUBLIC PROPERTY: Land, purchase of; when title becomes vested in the United States.

The question as to when the title to land purchased becomes vested in the United States arose in connection with the payment of rent for the period from July 1 to 17, 1913, upon a tract of land that had been leased to June 30, 1913, with option to purchase, it appearing that the deed of sale of the property to the United States had been signed and delivered, and that the title had been approved by the Attorney General prior to July 1, 1913.

Held, that deeds of sale of land to the Government are delivered with the intention that they shall become operative when the Attorney General approves the title (*Ryan v. United States*, 136 U. S., 86), and that since in this case the Attorney General approved the title before July 1 the title to the property became vested in the United States before that date, and hence rent for the period from July 1 to 17 could not be paid.

(80-214.13, J. A. G., Aug. 28, 1913.)

PUBLIC PROPERTY: Loss of, due to fault of officer, agent, or employee.

Upon a question as to the legal right of the department to withhold from the pay of the superintendent of the Antietam battlefield the sum of \$110 to cover the value of the Government property for which said superintendent was responsible and which, it was alleged, had been destroyed by fire as the result of his misconduct,

Held, that it is an established rule that in an action by a servant to recover wages the master may show, by way of set-off or defense to the claim, injuries to his property caused by the servant's negligence, misconduct, or lack of due diligence in the performance of his duties; and that acceptance of the position of superintendent of the Antietam battlefield served to establish the relation of employer and employee, or master and servant, between the Government and the incumbent of the position, and justified the official charged with supervising and paying said superintendent in invoking the foregoing rule if, through the neglect of the latter, public property was damaged or destroyed;

Held further, that the superintendent of the Antietam battlefield was a civilian employee within the meaning of paragraph 699, Army Regulations, 1910, which provides that—

"If articles of public property are embezzled, or lost or damaged through neglect, by a civilian employee, the value or damage as ascertained (and by a survey if necessary) shall be charged to him and set against any pay or money due him"; and as such civilian employee his pay was subject to deduction under the conditions specified in said regulation;

And held further, that as the superintendent of the Antietam battlefield was appointed by the head of an executive department pursuant to statutory authority (act of Aug. 24, 1912, 37 Stat., 440, and act of June 23, 1913, Pub. No. 3, p. 31), and the designation applied to the position in said statutes implied that said superintendent was to be intrusted with the immediate possession and safe-keeping of the public property pertaining to said battlefield, he should be regarded as an officer or agent of the Government within the meaning of the act of March 29, 1894 (28 Stat., 47); and that as such officer or agent his account with the Government might be debited with the amount of any loss sustained by the Government, through his fault, in respect of property intrusted to his care.

(80-121, J. A. G., Aug. 13, 1913.)

TRANSPORTATION: Cost of, of soldier convicted of absence without leave.

A soldier convicted by a court-martial of absence without leave was charged with the expenses incurred in transporting him from the place of apprehension to the place of his trial. The question submitted was whether he could also be charged with the expenses incurred in transporting him from the place of his trial to the station of his company.

Held, that where a soldier had been tried and convicted as in this case, and the cost of his transportation from the place of apprehen-

sion to the place of his trial had been deducted from his pay he could not thereafter be charged with the further expense of his transportation from the place of trial to his station.

(94-241, J. A. G., Aug. 6, 1913.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

ABSENCE: From duty on account of injury due to misconduct.

The act of August 24, 1912 (37 Stat., 572), provides that—

"No officer or enlisted man in active service who shall be absent from duty on account of disease resulting from his own intemperate use of drugs, or alcoholic liquors, or other misconduct, shall receive pay for the period of such absence from any part of the appropriation in this act for the pay of officers or enlisted men, the time so absent and the cause thereof to be ascertained under such procedure and regulations as may be prescribed by the Secretary of War."

A private of cavalry became unfit for duty November 10, 1912, by reason of loss of vision, left eye, due to rupture of eyeball, accidentally incurred November 10, 1912, by elbow of a comrade while engaged in a drunken brawl, not in line of duty. He was discharged March 15, 1913, "on account of loss of vision, left eye, due to rupture of eyeball. Disease not incurred in line of duty." Upon the question as to whether his pay for the above period was properly withheld,

Held, that absence with consequent loss of pay within the meaning of the above act must be on account of disease; that where there was disease, the determination of "the cause thereof" was to be reached according to the procedure and regulations established, and such procedure and regulations must be understood and construed to relate to disease and the manner of determining its cause and the duration of the absence resulting therefrom; that it appeared that the disability on account of which the soldier was absent and finally discharged was due to an injury and not a disease, and hence the case did not come within the purview of the act of August 24, 1912, and the regulations made by the Secretary of War in pursuance thereof; that said act dealt with absence on account of *disease* and not on account of *injury*, and, being in the nature of a penal statute, must be construed strictly.

(Asst. Comp. W. W. Warwick, Aug. 4, 1913.)

COMMUTATION OF QUARTERS: Public quarters at post fully occupied through assignments to officers in excess of their authorized allowances.

The Auditor submitted to the Comptroller for approval, disapproval, or modification his decision, as follows:

"That, when it is certified to this office by the proper officer on a voucher for payment of commutation of quarters that the officer to whom payment is made is on duty without troops, and that the

public quarters at the post or station at which he is serving are fully occupied, it is the duty of this office to admit such voucher regardless of the fact that it is known that the officers occupying such quarters are occupying more than their authorized allowance of rooms."

Held, that with but very few exceptions made by law the certificate of approval of an officer is not intended to be conclusive upon the accounting officers, but that the latter must render a decision on the legality of the claim for payment or for crediting an account upon the facts; that upon them is cast the responsibility for securing the facts and upon other officers the duty of furnishing upon request such evidence in addition to certificates as may be called for by the accounting officers; that this right to call for evidence is inseparable from the duty to audit and to decide questions of law and fact, and that it must be exercised reasonably as must any public duty, but that the accounting officer, and not an administrative officer incurring liabilities or expending public funds, must determine the extent to which it may be necessary to go in any particular case in collecting the evidence to establish what he believes to be the essential fact as a basis for decision; that the certificate that public quarters at a post are fully occupied should be accepted as prima facie evidence of the facts underlying the conclusion certified to but should not be considered as the best evidence in all cases nor as relieving the Auditor of responsibility of determining the facts and securing the evidence necessary to a decision.

Held further, that the fact that an officer's application for assignment of quarters in kind was denied did not entitle him to commutation of quarters, if in fact there were public quarters at the post or station which might have been assigned to him, but that, under existing conditions as to construction of houses, rooms in excess of the authorized allowance in a single house assigned to and occupied by an officer and his family were not rooms that must necessarily have been assigned to another officer, and that while such conditions existed these excess rooms were not quarters and probably ought not to have been provided with furniture or light or separate heating; that commutation of quarters for an officer on duty at a post where there were public quarters could not be granted by an order; that the facts determined the right and that when the only rooms unoccupied were rooms in single houses in excess of the authorized allowance of the occupants of those houses, but not adapted for separate quarters, there were no public quarters within the meaning of the law, but that the contrary was true where there were quarters occupied by persons not entitled to quarters; that the question whether or not there were inhabitable although undesirable public quarters and all other questions involved in the payment of commutation must be decided by the Auditor or Comptroller in each case, and that while they might prefer to accept the decision of other officers they could not shift their duty in this manner, and must accept certificates of facts and conclusions only so far as they believed the situation justified that course.

(Asst. Comp. W. W. Warwick, Aug. 18, 1913.)

COMMUTATION OF QUARTERS: Status of officer directed to retain his station where no duties were to be performed.

An officer of the Second Infantry on duty at the Army War College was relieved from duty there by Special Orders No. 100, War Department, April 27, 1912, to take effect July 1, 1912, and by Special Orders No. 124, War Department, May 25, 1912, he was granted leave of absence for two months to take effect upon his relief from said duty. By Special Orders No. 150, War Department, June 26, 1912, he was transferred from the Second to the Ninth Infantry. Under date of June 26, 1912, the Adjutant General's Office addressed a letter to him, of which the following is an extract:

"The Secretary of War directs that, upon being relieved from your present duty, you retain station in this city until the arrival of the Ninth Infantry at its stations in this country, and that upon the expiration of your leave, you join the station designated by the commanding officer, Ninth Infantry."

Held, that this case came within the principal of the decision of the Comptroller, in 7 Comp. Dec. 502, where he held, quoting from the syllabus:

"An officer of the Army, who was relieved from duty in Alabama, assigned to duty as special inspector of the Quartermaster's Department, and directed to proceed from Washington to various points in Cuba and to take station at Washington, did not acquire a permanent station at Washington, and he is not entitled to commutation of quarters;" that in the present case it would seem that the purpose of the instructions of June 26, 1912, *supra*, was to keep the officer in a commutation-of-quarters status after his relief from duty at the Army War College on July 1, 1912, and hence he would not be entitled to commutation of quarters after July 1, 1912, until the date upon which he should report for duty with his organization.

(Asst. Comp. W. W. Warwick, June 18, 1913.)

CONTRACTS: Damage for delays caused by the United States; unliquidated damages.

A Government dredging contractor was delayed in commencing operations upon a certain portion of his work by the failure of the Government inspector to lay out the work, which failure was due to the loss of a blue-print map which had been mailed to the inspector, but had not been received by him. During the period of delay the contractor's plant was idle, at an estimated damage or cost of \$300.41, for which a bill was rendered by the contractor against the United States. The contract provided for a corresponding extension of time for the completion of the work on account of delays caused through the fault of the Government.

Held, that as the contract provided a method for determining the damages resulting from delays caused by the Government, said method was exclusive and prohibited the allowance of any other damages (15 Comp. Dec., 282; 16 *id.*, 714; *New Jersey Foundry and Machine Co. v. United States*, 44 Ct. Cls., 178); *held further*, that the claim was one for unliquidated damages, which the executive

officers of the Government were without authority to settle (*Cramp v. United States*, 216 U. S., 494).

(Comp. Geo. E. Downey, Aug. 21, 1913.)

CONTRIBUTED FUNDS: In connection with authorized work of improvement of rivers and harbors.

Section 8 of the river and harbor act, approved March 4, 1913 (37 Stat., 827), provides as follows:

"That the Secretary of War is hereby authorized to receive from private parties such funds as may be contributed by them to be expended in connection with funds appropriated by the United States for any authorized work of public improvement of rivers and harbors, whenever such work and expenditure may be considered by the Chief of Engineers as advantageous to the interests of navigation."

Held, That any funds received by the Secretary of War under the provisions of the above section of said act of March 4, 1913, should be deposited by him in the Treasury of the United States as a special fund, properly designated in each case to distinguish it from other funds where it would be subject to his official direction the same as the funds appropriated by Congress for the particular objects for which such funds are contributed; that the amounts of the disbursements of such special funds should be filed, audited, and accounted for the same as the funds appropriated by Congress, this being the only way of keeping proper track of said funds.

(W. W. Warwick, Asst. Comp., July 17, 1913.)

INSURANCE: Disposition of moneys received from, upon dredges being constructed under contract, which were damaged by fire.

Two dredges being built under contract for the Engineer Department were damaged by fire in the contractor's plant. The specifications to the contract contained the following provision as to insurance:

"The contractor shall keep the dredges or component parts thereof insured against fire and marine risks, at his own cost, for and in behalf of the United States, and in the name of the contracting officer, to at least the full amount of the payments which shall have been made by the United States * * *."

The loss to the dredges by fire was reported to have totaled \$3,411.77, which amount was paid to the contracting officer. Of this amount, \$1,603.27 represented the loss on material for which the Government had already paid, and the balance, \$1,808.50, represented the amount due the boiler works for material which they had furnished but for which they had not been paid by the Government. The question submitted was as to what disposition should be made of the insurance money received.

Held, that the amount which represented the loss on material for which the Government had already paid, i. e., \$1,603.27, should be deposited to the credit of the appropriation under which the dredges were being constructed, in order to restore the proportion that ex-

isted in the case of each dredge before the fire between the payments and the percentage of completion of the work; that the balance of the insurance received, \$1,808.50, should also be placed to the credit of the appropriation under which the dredges were being constructed in order to have an accounting of the full amount of insurance paid, and that then the contractors should be paid from the appropriation a similar amount as for materials furnished under the contract less the proper retained percentages, noting on the voucher that the payment was for materials lost by the fire and not paid for but reimbursed to the Government in that amount under the insurance policy. (Asst. Comp. W. W. Warwick, July 21, 1913.)

SIX MONTHS' GRATUITY PAY: What constitutes "designation" within the meaning of the act of May 11, 1908.

A sergeant of cavalry was enlisted January 6, 1911, and died May 3, 1913. On the day of his enlistment he designated his mother as his beneficiary to receive the six months' gratuity pay in the event of his death. She died May 5, 1912. He made no other formal designation of a beneficiary, but on July 4 he wrote to his sister as follows:

"Nellie, it will be a good thing for you to keep communications with both of us (meaning his brother Thomas, also in the service, and himself), because in event of our deaths at any time you will get the six months' pay from the U. S. Of course, we hope nothing happens like that, but if it does would just as leave see you get it as the U. S. keep it."

Members of his troop testified to the handwriting of this letter as his, and also that he had said after his mother's death that he "had nothing to do with his money except to help his sister," and that he intended making her his beneficiary.

Held, that the act of May 11, 1908 (35 Stat., 108), under which the payment of six months' gratuity pay is authorized, is a beneficial statute and should be liberally construed; that the designations thereunder should be made in accordance with the regulations promulgated by the Secretary of War to insure against fraud and mistake, and that "no departure from the regulations should be recognized except where it is clear there has been an informal designation, and that it is entirely free from doubt, or fraud, or mistake;" that in the present case the soldier's letter to his sister did not contain language amounting to a gift or designation, but was rather the statement of a supposed fact; that the testimony of the member of his troop that he intended making his sister his beneficiary was not the testimony of a designation *made* but of one *intended to be made*, and that under the facts as appearing there was no designation of a beneficiary to receive his six months' gratuity pay, within the meaning of the laws and regulations governing the same.

(Asst. Comp. W. W. Warwick, Aug. 2, 1913.)

TRANSPORTATION: Passenger; party rates.

A railroad company filed a claim for passenger transportation service, rendering its bills on the basis of the regular single-fare

rates, while the Auditor in the settlement of the claim based his allowance upon the party-fare rates, as published in the company's tariff. It appeared that the company in the publication of its party-fare rates stipulated that—

"These fares are available only when cash is paid at the time the ticket is issued."

It further appeared that the service under consideration was furnished on requests which called for transportation of the number of men indicated but without specifying party ticket, and that a single ticket for the entire party was furnished in all but four of the accounts included in the claim submitted for settlement; and that with these four exceptions the class of service received was, therefore, party service, i. e., the transportation of a number of persons on a single ticket, and was therefore, subject to all the incidents of party service on the part of both the travelers and of the railroad company. Upon an appeal from the Auditor's settlement,

Held, that party tickets having been furnished the Government, which subjected the travelers to the same conditions as all other travelers on party tickets, there was no reason why the Government should pay a higher rate merely because the service was not paid for at the time; that the transportation under consideration was furnished in accordance with the long-established practice of the transportation companies to accept Government transportation requests in lieu of cash and furnish the transportation indicated thereon and present the said requests to the proper Government officer for payment; and that when the transportation was so furnished the only recognized basis of payment therefor was the cash basis; that the transportation was, therefore, furnished the Government on its personal credit, which was considered as equivalent to cash and so accepted; and that settlement therefor should be made upon that basis; that the amount to be allowed should be determined by applying the party rates for the party service and the individual rates for individual service; in other words, by applying the same rates as are charged the public for like and similar service.

(Comp. Geo. E. Downey, Aug. 29, 1913.)

TRANSPORTATION: Personal baggage of an Army officer entitled to mileage.

An Army officer traveling abroad under conditions which entitled him to mileage presented his accounts containing charges for transportation of personal baggage amounting to 150 pounds or less, while so traveling. Paragraph 1137, Army Regulations, 1910, provides:

"An officer drawing mileage is entitled to free transportation for 150 pounds of baggage. If his ticket does not cover the full 150 pounds, the Quartermaster Corps will furnish transportation for the difference as excess baggage."

The act of June 12, 1906 (34 Stat., 246), provides:

"Hereafter officers, active and retired, when traveling under competent orders without troops, and retired officers who have so traveled since March 3, 1905, shall be paid seven cents per mile, and no more. * * *"

Held, that the statute having limited the allowance of an officer traveling under conditions which entitle him to mileage to 7 cents per mile and no more, the payment of anything in addition for the transportation of his personal baggage while so traveling was not authorized, and that said paragraph 1137 of the Army Regulations was contrary to law and without legal effect.

(Asst. Comp. W. W. Warwick, July 29, 1913.)

OPINIONS OF THE ATTORNEY GENERAL.

(Digests prepared in the office of the Judge Advocate General.)

ABSENCE: Leave of, to an officer of the Engineer Corps to permit of his employment by the Interstate Commerce Commission.

The Secretary of War submitted the question as to whether under the provisions of section 1224, Revised Statutes, he was authorized to grant leave of absence to an officer of the Engineer Corps in order that he might be employed by the Interstate Commerce Commission to assist in the valuation of properties of carriers under the act of March 1, 1913. Said section provides—

“No officer of the Army shall be employed on civil works or internal improvements, or be allowed to engage in the service of any incorporated company, or be employed as acting paymaster or disbursing agent of the Indian Department, if such extra employment requires that he shall be separated from his company, regiment, or corps, or if it shall otherwise interfere with the performance of the military duties proper.”

Held, that the above section applied to officers of the Engineer Corps as well as to other officers of the Army; that the kind of employment proposed was employment on civil works or internal improvements within the prohibition of said section; that it would require the officer to be separated from his company, regiment, or corps, and that it would interfere with the performance of his military duties proper, both of which conditions likewise come within the prohibition of said section; and that, therefore, there was no legal authority for granting leave of absence for the purpose proposed.

(Opin. Atty. Gen. July 2, 1913.)

ARMS AND MUNITIONS OF WAR: Certain articles that are embraced within the term; others that are not.

The export of saddles, bridles, canteens, and carbine scabbards by merchants in the United States to merchants in Mexico falls within the purview of the President's proclamation of March 14, 1912, issued pursuant to joint resolution of same date prohibiting transportation of arms and munitions of war to Mexico.

(29 Opin. 394, Apr. 20, 1912.)

The export of gun grease falls within the prohibition of said proclamation.

(29 Opin. 414, May 20, 1912.)

The export of paper caps for toy cap pistols does not fall within the prohibition of said proclamation.

(29 Opin. 571, Nov. 18, 1912.)

Whether the export of certain air rifles falls within the prohibition of said proclamation is a question of fact dependent upon whether they can be used in the destruction of life.

(30 Opin. 9, Jan. 6, 1913.)

ARMS AND MUNITIONS OF WAR: Provisions and clothing for use of troops.

The Acting Secretary of War, under date of August 5, 1913, requested an opinion upon the following subject, namely:

"Are the items 'provisions' and 'clothing' for the use of troops to be considered as embraced within the term 'munitions of war' in contemplation of the President's proclamation of March 14, 1912, and the joint resolution of Congress of the same date?"

Said joint resolution amended the joint resolution relating to "coal or other material used in war," approved April 22, 1898 (30 Stat., 630). The resolution as amended prohibits the export of arms or munitions of war to any country in which according to the President's proclamation conditions of violence exist which are promoted by the use of such materials.

Held, that neither provisions, nor ordinary, as distinguished from military, clothing fall within the category of "munitions of war." (Opin. Atty. Gen., Aug. 11, 1913.)

DECISION OF UNITED STATES COURT.

(Digest prepared in the office of the Judge Advocate General.)

COURTS-MARTIAL: United States Navy; jurisdiction and pleadings; habeas corpus.

An enlisted man of the Navy had been tried by a court-martial for making, under oath, false and contradictory statements concerning frauds practiced by him upon the United States in conjunction with representatives of Government contractors from whom supplies for the Navy were purchased. He was found guilty and sentenced to five years' imprisonment at hard labor, deprivation of pay for that period, and dishonorable discharge at the expiration of said period of five years.

1. Article 8 of the articles for the government of the Navy (U. S. Comp. St. 1901, p. 1105), under the head of offenses punishable at the discretion of a court-martial, provides that such punishment as the court-martial may adjudge may be inflicted on any person of the Navy who is guilty of profane swearing, falsehood, drunkenness, gambling, fraud, theft, and any other scandalous conduct tending to the destruction of good morals. *Held*, that a charge against a chief commissary steward on board a battleship of scandalous conduct tending to the destruction of good morals, in that on one oc-

casion he made an affidavit confessing certain frauds against the Government in connection with supply contractors for the Government, while on another occasion he testified under oath before a duly constituted court of inquiry, and denied the truth of his former statement, was sufficient.

2. Constitution of the United States, Article I, confers on Congress the right to make rules for the government and regulation of the land and naval forces, and Article III gives Congress the power to create certain Federal courts. *Held*, that such powers are independent of each other, and hence that determinations of military courts-martial within their jurisdiction are not reviewable by the civil courts.

3. Where a charge against a person tried by a military court is within the court's jurisdiction, and is authorized by the Army or Navy regulations, the manner of setting out the offense is a matter of pleading, rather than jurisdiction, the sufficiency of which is for the exclusive determination of the court-martial.

4. Where a court-martial had jurisdiction to try petitioner for an offense against the naval regulations and to impose sentence authorized thereby, a civil court in a habeas corpus proceeding could only review the question of jurisdiction, and could not pass on alleged errors of law committed by the court-martial or on the severity of the sentence imposed.

(*Ex parte Dickey*, U. S. District Court, District of Maine, 204 Fed. Rep., 322.)

BULLETIN 31.

BULLETIN }
No. 31. }

WAR DEPARTMENT,
WASHINGTON, *October 10, 1913.*

The following digest of opinions of the Judge Advocate General of the Army for the month of September, 1913, including one opinion for August, 1913, not heretofore published, of certain decisions of the Comptroller of the Treasury, and of decisions of courts, is published for the information of the service in general.

(2054671 C—A. G. O.)

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

APPROPRIATIONS: Lump sum; payment for personal services from; promotion to places of the same designation.

It was proposed to promote certain clerks and employees of the Signal Service at large, paid from lump-sum appropriations, to positions of the same designation, at the same places, and at increased rates of compensation, but which rates were not in excess of those paid for the same or similar services during the preceding fiscal year. Section 7 of the act of August 26, 1912 (37 Stat., 626), as amended by section 4 of the act of March 4, 1913 (37 Stat., 790), provides—

“That no part of any money contained herein or hereafter appropriated in lump sum shall be available for the payment of personal services at a rate of compensation in excess of that paid for the same or similar services during the preceding fiscal year; nor shall any person employed at a specific salary be hereafter transferred and hereafter paid from a lump-sum appropriation a rate of compensation greater than such specific salary, and the heads of departments shall cause this provision to be enforced.”

Held, that it was not the purpose of this law to forbid promotions from one established position to another as vacancies might occur, where the compensations were to be paid from lump-sum appropriations, although the designations might be the same and the duties more or less similar, and that where such positions existed during the preceding fiscal year, it would ordinarily be assumed that the duties were not the same or similar within the meaning of the law; but that increases in compensation without change of position, although given for increased proficiency or experience and although

not in excess of the rates of compensation paid for the same or similar services in other positions during the preceding fiscal year, could not lawfully be made. *Held*, therefore, that if the promotions were to fill vacancies in established positions which existed during the preceding fiscal year they might lawfully be made; otherwise not.

(5-075, J. A. G., Sept. 9, 1913.)

BONDS: Of bidders and contractors for supplies; annual or blanket bonds.

The Chief of the Quartermaster Corps submitted a plan for allowing prospective bidders and contractors to file annual or blanket bonds covering all bids to be made by them within a stipulated period and the performance of awards or contracts thereunder.

Held, that as the statute did not require guaranties or bonds in respect to the purchase of supplies or the procurement of services for the Army, there was no legal objection to adopting a form of annual bond to replace the guaranty and bond required by regulations in support of each bid and contract, respectively; but *advised*, owing to the fact that in fixing the penalty in bonds guaranteeing the performance of contracts upon public works, in which class of contracts the statute required such bonds, the claims of laborers and material men must be considered, the matter of applying the proposed form of bond to contracts for the construction and repair of buildings or other public works should be deferred until the plan had been given practical application in respect to the purchase of supplies and procurement of services.

(12-150, J. A. G., Sept. 11, 1913.)

CLERKS AND EMPLOYEES: Hours of labor on Saturday; working overtime.

Certain skilled office laborers at the Army Arsenal, Philadelphia, Pa., refused to obey the order of the commanding officer to work Saturday afternoons during the month of August in order to bring up the work of the office, which had fallen behind, and which, in connection with the necessity for the speedy manufacture of certain ammunition, created emergent conditions justifying the employment of laborers beyond the time for a legal day's work. The Executive order of June 25, 1909 (W. D. Circ. No. 42, July 6, 1909), provided that during the months of July, August, and September of each year, and until further notice, four hours, exclusive of the time for luncheon, should constitute a day's work on Saturdays for all clerks and other employees of the Federal Government wherever employed, with the proviso that—

"This order shall not apply to any bureau or office of the Government, or to any of the clerks or other employees thereof, that might for special public reasons be excepted therefrom by the head of the department having supervision or control of such bureau or office."

Held, that the commanding officer of the arsenal was not the "head of the department," within the meaning of said proviso, who had authority to except the clerks or employees of any bureau or

office under his control from the operation of the order, but that the power to make such exceptions should be limited to the heads of departments as the term is commonly understood.

Held further, that the effect of the order was to make Saturdays during the months of July, August, and September a four-hour day out of what would otherwise have been an eight-hour day and subject to the same limitations, and that in case of emergency the hours might be extended the same as in the case of an eight-hour day.

(16-210, J. A. G., Sept. 8, 1913.)

CONTRACTS: Alterations and extensions; assent of sureties.

An opinion was desired as to whether the assent of the sureties on the contract should be obtained where the same was modified, as in the case referred to, by materially reducing the quantity called for, and also as to whether it was necessary to have such assent to an extension of the contract, in view of the fact that the bond covered the original performance of the contract "as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same." The accompanying form of extension used by the Quartermaster Corps imposed upon the contractor responsibility for loss by fire or other cause, and gave the United States the right to make charges for inspection and for damages, and to take over the work from the contractor whenever, in the opinion of the officer in charge of the same, reasonable and satisfactory progress was not being made, together with the right to use the contractor's materials and appliances for that purpose.

Held, that the obligation of a surety is strictly construed, and any material alteration, without his consent, of the contract for the performance of which he is obligated, even though it be for his benefit, will result in his release; and *held further*, that the consent of the surety should be obtained both in the matter of the modification and of the extension of the contract, and that it would be unsafe to rely upon the consent to an extension given in the condition of the bond should the extension be granted under the conditions proposed.

(76-400, J. A. G., Sept. 26, 1913.)

COPYRIGHTS: Of photographs made by a Government employee.

An engineer of the Coast Artillery School detachment at Fort Monroe, Va., requested authority to copyright photographs made by him of projectiles and gases at the muzzles of guns and mortars, in order to insure that they would not be used for advertising purposes and general circulation. The question was raised as to the propriety and legality of copyrighting such photographs in the name of the director of the school, where the work was done, or in the name of the secretary of the school, the official character of the officer to appear in the copyright.

Held, that under the copyright law no person is entitled to a copyright unless he is the "author, inventor, or designer, within the

meaning of the copyright laws"—that is, he must "by his own intellectual labor and skill produce a work new and original in itself," or he must be the legal representative or assignee of such person (9 Cyc. 10, et seq.). *Held*, therefore, that the photographs in question could not be copyrighted in the name of the officials designated except in the character of assignee of the one who might make the photographs; and *advised*, that, if the assignment be made, it be taken by the official for and on behalf of the United States.

(24-330, J. A. G., Sept. 3, 1913.)

DETACHED SERVICE: Forfeiture of pay for ordering or permitting the same, in violation of law.

The Secretary of War had decided upon the evidence then before him that a certain officer of the Army had violated the provisions of law relative to detached service by ordering or permitting a junior officer to remain on such service contrary to law, and had ordered a forfeiture of the officer's pay in accordance with the following provision of the act of August 24, 1912 (37 Stat., 571):

"All pay and allowances shall be forfeited by any superior for any period during which, by his order, or his permission, or by reason of his failure or neglect to issue or cause to be issued the proper order or instructions at the proper time, any officer shall be detached or permitted to remain detached in violation of any of the terms of this proviso."

The officer stated as a reason why his pay should not be forfeited that he had not violated the law intentionally.

Held, that the law is violated when the acts forbidden by it are done; and *advised* that the law should take its course in this case. Assuming, what is questionable, that the present case falls within the pardoning power of the President; *held further*, that the order of forfeiture related back to the pay of the superior for the period during which the junior was detached, and that a subsequent pardon or remission would not restore it.

(6-124, J. A. G., Sept. 8, 1913.)

EIGHT-HOUR LAW: Extraordinary emergency; repair of cable obstructing navigation.

A wire transmission line of the cable at Dam No. 28 in the Ohio River broke, and together with a half-inch fall line dropped into the river. Early next morning certain employees of the Engineer Department started to replace the broken transmission line. Ordinarily this work could have been completed in one day, but in this case the old transmission line got fouled between the carriers of the new line and the lines became so entangled that at quitting time they formed a complete and dangerous obstruction to navigation and could not be slackened or tightened sufficiently to clear the channel of the obstruction. To remove this obstruction the men labored in excess of eight hours in one day upon the work.

Held, that the difficulty due to the entanglement of the lines was plainly of an unusual character, not inherent in the work, and its occurrence could not be foreseen, and that such a state of facts constituted an extraordinary emergency within the meaning of the eight-hour law of March 3, 1913 (37 Stat., 726), and justified working the men more than eight hours in one day.

(32-232, J. A. G., Sept. 3, 1912.)

EIGHT-HOUR LAW: Including provisions of, in a contract for renovating blankets.

A contract was to be entered into in pursuance of an advertisement and award for renovating blankets for the Government and for folding them preparatory to shipment.

Held, that the process of renovation was similar to the process of laundering, and was not to be classed as a process of manufacture; that it could not, therefore, be treated as the manufacture of a supply which could be purchased in the open market without reference to the eight-hour law of June 19, 1912 (37 Stat., 137); and that the provisions of said law relating to the extraction of a penalty for a violation of its requirements should be inserted in the contract.

(76-720, J. A. G., June 25, 1913.)

Held further, that the provision of the law that no laborer or mechanic should be required or permitted to labor more than eight hours in any one day upon work contemplated by the contract, did not prohibit such laborer or mechanic, after working eight hours in one day upon a Government contract, from working additional time upon some other contract. 29 Op. Atty. Gen., 534.

(76-720, J. A. G., Sept. 13, 1913.)

INTERNATIONAL CONGRESSES: Participation therein by the United States Government.

The joint resolution of June 25, 1910 (36 Stat., 886), provides:

"That the President of the United States be, and he is hereby, authorized to invite the International Congress of Refrigeration, now about to assemble in the city of Vienna, to hold its third meeting in the United States of America: *Provided*, That no appropriation shall be asked or granted for any expense connected with the said congress."

The act of March 4, 1913 (37 Stat., 913), provides:

"Hereafter the Executive shall not extend or accept any invitation to participate in any international congress, conference, or like event, without first having specific authority of law to do so."

The International Congress of Refrigeration was to be held at Chicago, Ill., September 15 to 24, 1913, and an invitation was extended to the War Department to send delegates thereto.

Held, that, while it might be questionable whether the statute forbidding the Executive from extending or accepting any invitation to participate in any international congress should be so construed

as to forbid the participation of the department in such a congress as the one under consideration, if it would not involve any expenditure on the part of the Government, there could be no legal objection to the presence in said congress of representatives of the War Department for the purpose of giving or receiving information regarding the work of the department in its relation to the objects of said congress, where such presence would not involve any expenditure on the part of the United States; and *held also*, that the Secretary might legally name delegates from the War Department to attend said congress, if all the expenses incident to their attendance should be defrayed by said congress.

(5-082, J. A. G., Sept. 4 and 17, 1913.)

MEDICAL ATTENDANCE: Payment for, when rendered to an employee of the Mississippi River Commission.

An employee of the Mississippi River Commission was injured in the course of his service with said Commission, and a bill for medical and surgical services in his case, rendered at the request of the United States officials, was presented for payment. The Commission had previously issued a circular containing regulations among which was one which authorized officers in charge of works under its control, in case of sickness or injury of any employee, to employ a physician and to act upon his advice in the care and treatment of such employee, and in a proper case to place the employee in a hospital maintained by the United States, or, if there should be none such within reach, to place him in a private hospital and to pay the expense of his care and treatment therein.

The employees' compensation act of May 30, 1908 (35 Stat., 556), provides for continuing the pay of any artisan or laborer injured in the employ of the United States without his own negligence, while engaged, among other things, "in the construction of river and harbor or fortification work."

Held, that the medical treatment in this case related to the services already rendered under the employee's contract, and was not compensation for the injury which was provided for in the act of May 30, 1908, or an enlargement of the relief granted by said act, and that the bill might be approved for payment.

(5-251, J. A. G., Sept. 8, 1913.)

MILITARY INSTRUCTION: Issue of arms and equipment to high schools.

The question was submitted as to whether the Government favored the giving of military instruction to students of high schools and whether it provided aid in the form of equipment for such schools. Section 1225, Revised Statutes, authorizes the detail of officers of the Army and the issue of arms, etc., for military instruction "upon the application of any established military institute, seminary or academy, college or university within the United States, having capacity to educate, at the same time, not less than 150 male students."

Held, that schools of the public-school system did not come within the description "any established military institute, seminary or acad-

emy, college or university" within the meaning of those terms as used in said section of the Revised Statutes, and that the Government officials could not provide aid in the form of military equipment for instruction at a high school.

(56-320, J. A. G., Sept. 19, 1913.)

MILITARY RESERVATIONS: Regulating the practice of medicine thereon; license for lighthouse purposes.

A contagious disease had broken out in the family of a lighthouse keeper upon the Fort Moultrie, S. C., military reservation, and a civilian physician who attended the family failed to report the disease or to place the family in quarantine, in consequence of which the disease was transmitted to the family of a soldier residing in the vicinity. The only record in the office as to the occupancy of any portion of said reservation for lighthouse purposes was a letter to the Secretary of the Treasury stating that authority would be granted for the Lighthouse Board to place two range beacons and a keeper's dwelling on the reservation, but there was no record that the land occupied for such purposes was ever transferred away from the War Department. Paragraph 302, Manual for the Medical Department, 1911, regulates the practice of civilian physicians on military reservations and places upon commanding officers of posts the duty of taking proper steps for checking the spread of infectious or contagious diseases.

Held, that the ground occupied for lighthouse purposes still remained a part of the reservation and continued subject to such regulations of the War Department governing military reservations as were not inconsistent with the permission granted to occupy said premises: *Held further*, that ample authority was granted by the regulations for regulating the practice of civilian physicians upon said reservation and for establishing quarantines thereon.

(80-541.32, J. A. G., Aug. 15, 1913.)

PRISONERS: Expense of holding military, by civil authorities; appropriation chargeable.

A soldier while absent from his company without leave was arrested by a constable as a deserter. On being notified of the arrest, the company commander telegraphed the constable to hold the prisoner and await further instructions. Later a military guard was sent to the place where the soldier was held in custody, to whom the constable delivered the prisoner. No charge of desertion was entered upon the company's rolls against the soldier and no sufficient evidence appeared to show that he was in fact a deserter.

Held, that all expenses properly incurred by the constable after the receipt of the telegram from the company commander to hold the prisoner for further instructions, including a reasonable compensation for guarding the prisoner, as well as reimbursement for cost of meals and lodgings on his account, were chargeable to the United States and should be paid from the appropriation for contingencies of the Army.

(26-260, J. A. G., Sept. 6, 1913.)

PUBLIC PROPERTY: Donation of building on military reservation to be used for public worship.

A chaplain in the Army, under permission from the post and department authorities, constructed a chapel on a military reservation from private subscriptions solicited by him, with the understanding that the chapel would be available for the use of all chaplains who might be stationed at the post, without regard to denomination, and that upon completion the building would be presented to the United States. After completion a formal tender of the building to the Government was made.

The act of May 31, 1902 (32 Stat., 282), authorizes the Secretary of War to permit the construction by the Young Men's Christian Association of such buildings as their work for the promotion of the "welfare of the garrisons may require."

Held, in view of the construction heretofore placed upon said act to the effect that it should be regarded as giving the assent of Congress to the construction of buildings for strictly nonsectarian uses if within the purposes specified, although not constructed by the particular body named in the statute, that the Secretary of War might properly accept the building tendered, for the purposes stated, and that there was no necessity for an act of Congress accepting the same. C. 22340, J. A. G. O., April 17, 1908.

(80-815.1. J. A. G., Sept. 25, 1913.)

TERRITORIES: Public lands in Porto Rico; harbor areas.

The Chief of the Bureau of Insular Affairs asked whether the words "harbor areas" appearing in section 13 of the act of April 12, 1900, providing revenues and a civil government for Porto Rico (31 Stat., 80), could be construed to mean those areas bounded by harbor lines approved by the Secretary of War. Said section provided that certain described property in Porto Rico acquired by the United States under the cession from Spain, "but not including harbor areas or navigable waters," should be placed under the control of the government established by the act, to be administered for the benefit of the people of Porto Rico, and power was given the legislative assembly created by the said act to legislate with respect to all such matters as it might deem advisable, subject to limitations imposed upon all its acts. Afterwards the insular government claimed ownership, though without specific grant, of a large amount of public domain by reason of the former grant of some measure of autonomy by the Spanish Constitutional Monarchy, and accordingly the act of July 1, 1902 (32 Stat., 731), authorized the President, within one year after the approval of the act, to make such reservations of public lands and buildings belonging to the United States in Porto Rico as he might deem advisable for public purposes, and further provided that—

"All the public lands and buildings, not including harbor areas and navigable streams and bodies of water and the submerged lands underlying the same, owned by the United States in said island and not so reserved be, and the same are hereby, granted to the government of Porto Rico, to be held or disposed of for the use and benefit of the people of said island."

Held, that the term "harbor areas" was used in the two acts in the same sense; that the landward limit of such areas was the line of ordinary low-water mark, which line, though irregular and indefinite and changing by accretion, erosion, or avulsion, marked the boundaries of Federal ownership, and that a definite or more regular one could not be chosen for convenience by fixing harbor lines or otherwise, without authority of Congress.

(92-300, J. A. G., Sept. 15, 1913.)

TRANSPORTATION: Liability of common carriers for the loss of goods received for shipment.

Property of the United States was delivered at the freight depot of a railroad company by various dealers, who obtained shipping receipts bearing the notation "Government bill of lading to follow." The shipping directions sent to the various dealers had directed the said notation, and no information was furnished indicating any usage or custom to ship in advance of the execution of the Government bill of lading, save that one item of the property in question was shipped in this manner. The Government bill of lading was mailed from the office of the depot quartermaster, but before it had had time to reach its destination said property was destroyed by fire while at said depot.

Held, that it was not intended that the property should be shipped prior to the execution of the Government bill of lading, and that the carrier was justified in the view that said notation on the shipping receipt was equivalent to instruction to hold the property for a Government bill of lading. *Held further*, that as the property was not delivered and accepted for immediate shipment, the liability of the railroad company was that of warehouseman only and not that of a common carrier.

(80-013, J. A. G., Sept. 19, 1913.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

APPROPRIATIONS: Availability for transportation of material used in the manufacture of engineer equipment.

The question was submitted for decision as to whether the cost of transportation of lumber and other material used in the fabrication of pontoons or other engineer equipment should be charged to the appropriation "Engineer equipment of troops" or to the appropriation "Transportation of the Army and its supplies."

Held, that in view of the fact that the appropriation for engineer equipment of troops providing for the purchase of pontoon material made no provision for its transportation, the authority for such transportation from said appropriation could not be implied, especially in view of the appropriation made for the transportation of the Army and its supplies; and that in the specific case presented the transportation of the material purchased was a proper charge against the appropriation for Army transportation.

(Comp. Geo. E. Downey, Sept. 5, 1913.)

GRATUITY PAY: Six months, on death of soldier; designation of beneficiary.

A soldier died in the service from a disease incurred in the line of duty and not the result of his own misconduct. The act of May 11, 1908 (35 Stat., 108), as amended by the act of March 3, 1909 (35 Stat., 735), provides in such cases for the payment to the widow of such soldier "or to any other person previously designated by him" of an amount equal to six months' pay of the soldier at the rate he was receiving at the time of his death. On the date of the soldier's last enlistment he executed a beneficiary card in which he designated a certain person by name as his beneficiary, likewise calling her his wife and giving her address. After his death it appeared that the person so named was not his wife, who resided at another place and bore a different Christian name and from whom he was separated at the time of his death.

Held, that if a deceased soldier leaves a widow but designates another as his beneficiary, the gratuity is payable to the latter instead of to the widow, and that if in the case considered the person designated could be ascertained, although erroneously described as his wife and possibly given a wrong name, she would be entitled to the gratuity provided by law.

(Comp. Geo. E. Downey, Aug. 28, 1913.)

HEAT AND LIGHT ALLOWANCE: Officers on foreign service; validity of regulations.

The act of March 2, 1907, fixing the number of rooms to which each officer of the Army was entitled as quarters, further provided (34 Stat., 1167) that—

"Hereafter the heat and light actually necessary for the authorized allowance of quarters for officers and enlisted men shall be furnished at the expense of the United States under such regulations as the Secretary of War may prescribe."

Paragraph 1060, Army Regulations 1910, specified the number of rooms to which each officer was entitled and the fuel allowance per room in cords of oak wood. Paragraph 1052 of said regulations provided that—

"Each officer or noncommissioned officer entitled to and occupying public quarters, or quarters other than public which are heated by a separate plant, will be furnished at the expense of the United States with the quantity of fuel set forth in the table of allowances, paragraph 1060. * * * Where an officer or noncommissioned officer is occupying quarters other than public, not heated by a separate plant, or for which it is impracticable to furnish fuel in kind, the Quartermaster's Department will pay the owner or authorized agent of such quarters for the heat at the rate of \$4 a cord for the fuel allowance for the number of rooms to which the rank of the officer or noncommissioned officer entitles him as set forth in the table of allowances, paragraph 1060."

An amendment was added to this regulation under date of June 22, 1912, as follows:

"Where an officer or noncommissioned officer on detached service in a foreign country occupies quarters other than public, the Quar-

termaster's Department will pay the owner or authorized agent of such quarters for the heat furnished in accordance with the prescribed allowance for the number of rooms to which the rank of the officer or noncommissioned officer entitles him, at the local rates at the place where he is serving."

The Auditor for the War Department submitted his decision holding that said regulations were void in so far as they authorized the furnishing of fuel for the use of Army officers in excess of that actually necessary for the quarters they occupied, not exceeding the number of rooms to which they were entitled by law, and that unless the paragraphs were amended so as to fix approximately the value of the heat actually necessary it was the duty of the accounting officers to fix such allowances regardless of the regulations. The particular case was cited of an Army officer serving as a military attaché abroad whose fuel allowance was computed upon the value of oak wood at the point of service, or at the rate of about \$18 per cord.

Held, that upon the evidence submitted the conclusion would not at present be adopted that the fuel allowances prescribed in the regulations were largely in excess of the quantities of fuel actually necessary for heating the authorized allowance of quarters for officers, and until the Secretary of War had had time to consider and amend said regulations the accounting officers would continue to assume that the quantities of fuel therein prescribed did not exceed the quantities necessary.

With reference to the payment of the value of the fuel allowance to officers on detached service in foreign countries. *Held*, that the amendment to the regulations authorizing such payment at the local rates of fuel at the place where the officer is serving, should be interpreted as requiring, in a case to which the regulation applies, a computation based upon the value of the equivalent of the wood allowance in the fuel actually used at the local price of such fuel and not upon the price of oak wood at such place where the same was not actually used for fuel.

(Asst. Comp. W. W. Warwick, Sept. 23, 1913.)

PAY OF OFFICERS: Foreign-service pay while traveling abroad.

An officer of the Army was directed, as a member of a cavalry board, to proceed to Berlin, Germany, and take station at that place "for the purpose of observing and studying the cavalry branch of the German Army," and also of the armies of other countries enumerated. The board was further directed to "make such journeys between Berlin, Germany, and points in the countries herein named as may be necessary." In accordance with these orders the officer left Berlin and traveled to various points in the countries named in his orders. Upon the completion of his duties at one of said points he received an order that upon the completion of his duties abroad pertaining to the cavalry board he should repair to Washington, D. C., for temporary duty. He complied with this order by returning directly to the United States from the point last named without returning to his station in Berlin.

Held, that the duties performed by the officer at the various places visited were incidental to his assignment to his station at Berlin, so

that his station remained at the latter place until he left for the United States, and that the officer should be considered as having been assigned to and as having retained station at Berlin within the meaning of the act of March 2, 1901 (31 Stat., 1903), during the period in question and not as having been in a traveling status.

Held, therefore, that he was entitled to the increased pay for foreign service until his arrival in the United States.

(Comp. Geo. E. Downey, Sept. 10, 1913.)

QUARTERS: Commutation of, while on temporary duty; surrender of quarters.

An officer of the Army while occupying quarters at an Army post was ordered to report in person to the Chief of Staff, Washington, D. C., for temporary duty. The auditor disallowed payment of commutation of quarters while the officer was on duty in Washington because it did not appear that he was directed to surrender his quarters during his temporary absence from the post. It appeared that said quarters were not occupied during his absence by any member of his family and the same could have been assigned to other officers.

Held, that an order directing an officer to surrender his quarters during his temporary absence was not necessary under the circumstances to entitle him to commutation of quarters at his temporary station, and as there was no reason, so far as the officer was concerned, why these quarters might not have been assigned to some other officer, he was entitled to the commutation paid. The disallowance of the auditor was therefore reversed.

(Comp. Geo. E. Downey, Sept. 10, 1913.)

An Army officer was relieved from recruiting duty and detailed to obtain military information abroad. He was directed to repair to Washington, D. C., and report in person to the Chief of Staff for temporary duty in his office, and at the expiration of said duty to proceed to his station abroad. Commutation of quarters during his stay in Washington was disallowed on the ground that the temporary duty had been performed while the officer was in the status of changing station and while he had no station.

Held, that the officer's orders clearly assigned him to temporary duty at Washington before going to his foreign station, and that, being on duty without troops at a station where there were no public quarters, he was entitled to commutation therefor.

(Comp. Geo. E. Downey, Sept. 10, 1913.)

TRANSPORTATION: Of attendant in charge of horses; land-grant deductions.

The Government shipped three horses, in charge of an attendant, from Fort Worth, Tex., by way of New Orleans, La., to Washington, D. C., under an agreement previously made with the railroad company to accept therefor—

“the lowest net rates lawfully available as derived through deductions on account of land-grant distance from a lawful rate filed with

the Interstate Commerce Commission applying from point of origin to destination at time of the movement."

The Auditor settled both for the freight and for the attendant on the basis of rates from point of shipment by way of Cairo, Ill., in order to obtain the benefit of the longest land-grant deduction to which the Government was entitled. East of both Cairo and New Orleans the attendant was entitled to be carried free. The railroad company claimed for the transportation of the attendant at the net rate from Fort Worth to New Orleans, on the ground that the transportation was a passenger and not a freight movement, and should not be governed by the same considerations that fixed the lowest freight rate, which the company had agreed to accept, citing passenger classification notice, general exceptions, paragraph D, which provided that—

"Net fares established via land-grant lines through Cairo and Poplar Bluff will not be equalized by other routes."

Held, that the transportation of the attendant was an incident to the transportation of the horses and constituted an item in the general cost of such transportation, although as to the railroad company the revenue therefrom might be considered as "passenger revenue." The Auditor's settlement was therefore affirmed.

(Comp. Geo. E. Downey, Sept. 12, 1913.)

TRANSPORTATION: Commodity and class rates.

On revision of the action of the Auditor for the War Department on a claim for additional freight on a Government shipment, there appeared to be tariff authority for class rate as applicable as a proportionate rate and a commodity rate of equal authority affecting the shipment. Paragraph 7 (a), Tariff Circular No. 18-A, of the Interstate Commerce Commission, provides that—

"In every instance where a commodity rate is named in a tariff upon a commodity between specified points such commodity rate is the lawful rate and the only rate that may be used with relation to that traffic between those points, even though the class rate or some combination may make lower. The naming of the commodity rate on any article or character of traffic takes such article or traffic out of the classification and out of the class rates between the points to which commodity rate applies."

Held, that the commodity rate named in the tariff was the lawful rate to be applied to the shipment between the points involved although in excess of the class rate between said points on the shipment.

(Comp. Geo. E. Downey, Sept. 16, 1913.)

TRANSPORTATION: Of personal baggage of officers traveling under a mileage status.

The Auditor for the War Department submitted to the Comptroller his decision that there was no authority of law for the transportation at public expense of personal baggage accompanying an officer on a journey for which he received mileage, regardless of

whether such journey was on temporary duty, on temporary change of station, or on a permanent change of station, and that so much of paragraphs 1138 and 1151, Army Regulations, 1910, as authorized the transportation of excess baggage under such conditions was void.

Said paragraph 1138 of the Regulations provided for the transportation at public expense of the personal baggage of officers traveling under orders up to 150 pounds, where less than that amount was transported free for each passenger, and provided also for the transportation of personal baggage in excess of 150 pounds under certain conditions. Paragraph 1151 specified the amount of baggage and household effects that might be transported for an officer at public expense upon change of station, which amount was in excess of that usually transported free of charge under regular fares.

Held, that the term "baggage" had two significations: First, articles which a traveler requires or takes with him on a journey for his personal use or convenience and with reference to his immediate necessities or to the ultimate purposes of his journey, and second, to the portable equipment, including tents, clothing, utensils, and other necessities of the Army; that Congress, in appropriating for the transportation of the Army and its supplies, including transportation of the troops "and their baggage, and the cost of packing and crating" the same, had reference to the latter character of baggage, which was the only kind of baggage for which the law had made provision for shipment at public expense, except as personal baggage was included in the mileage allowance; and that there was no law which authorized the transportation at public expense of baggage as the term was used in the first sense under any circumstances outside of the mileage allowance. With this explanation the decision of the Auditor was approved, but in view of the fact that payment for transportation of baggage in the personal sense had been the long-continued practice, payments made by disbursing officers not later than September 24, 1913, being otherwise correct, would be passed to their official credit.

(Asst. Comp. W. W. Warwick, Sept. 19, 1913.)

DECISIONS OF COURTS.

(Digests prepared in the office of the Judge Advocate General.)

COURTS-MARTIAL: Composition of court; jurisdiction over officers of the Philippine Scouts.

An officer of the Philippine Scouts was tried by a general court-martial composed of officers of the Regular Army, and sentenced to be discharged from the service of the United States and to serve a term at hard labor.

The seventy-seventh article of war provides—

"Officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in article seventy-eight."

The seventy-eighth article relates to officers of the Marine Corps serving on courts-martial with officers of the Regular Army when

detached for service with the latter. On a petition for writ of habeas corpus—

Held, That the Philippine Scouts were not "other forces" within the meaning of the seventy-seventh article of war. The writ was therefore denied.

(*Atkinson v. Stewart*, Supreme Court, Philippine Islands, Nov. 8, 1912.)

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS: Jurisdiction over; trustee process.

An action of assumpsit on account annexed was brought in a State court in which action the National Home for Disabled Volunteer Soldiers was summoned as trustee. The principal defendant defaulted. The National Home had entered into a written contract with the principal defendant for the construction of certain improvements, and evidence was introduced tending to show a balance due such principal defendant in the hands of the treasurer of the Home at the time of the service of the writ upon the alleged trustee. The court followed the rule that the National Home could not be charged as trustee, for the reason that it was a disbursing agent of the United States Government. On appeal from plaintiff's exceptions to that ruling, *held*, that—

1. The principle that the sovereign can not be sued is predicated upon the condition that it has not consented to be sued, which it may do.

2. The National Home for Disabled Volunteer Soldiers, established under act of Congress March 21, 1866 (14 Stat., 10; U. S. Rev. Stat., sec. 4825 et seq.), is not subject to trustee process in an action brought in a State court; the institution not being properly regarded as having its place of business "within the State" within the trustee process statutes, since the State ceded to the United States jurisdiction over the lands on which the home is situated.

(*Brooks Hardware Co. v. Greer*, Supreme Judicial Court of Maine, 87 Atl. Rep., 889.)

BULLETIN 35.

BULLETIN }
No. 35. }

WAR DEPARTMENT,
WASHINGTON, November 7, 1913.

The following digest of opinions of the Judge Advocate General of the Army for the month of October, 1913, and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2094269, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ARMY ORGANIZATION: Promotion of chaplain; counting service in the Volunteer Army.

A person was appointed a chaplain in the Regular Army in June, 1908. He requested that his service as chaplain in the Volunteer Army from May 14, 1898, to February 22, 1899, be counted as service toward the period of seven years required under the provisions of the act of April 21, 1904 (33 Stat., 226), for his promotion to the grade of captain. Said act, after making provision for the promotion of certain chaplains from the grade of captain to that of major, provides—

“That the remaining chaplains shall have the grade, pay, and allowances of captain, mounted, after they shall have completed seven years of service: *And provided further*, That all persons who may hereafter be appointed as chaplains shall have the grade, pay, and allowances of first lieutenant, mounted, until they shall have completed seven years of service.”

Held, that the statute requires seven years of service as chaplain in the Regular Army as a condition precedent to advancement to the grade of captain, and that the officer was not entitled to have his volunteer service counted in computing the seven years of service which he must complete prior to his advancement to the grade of captain.

(6-229.3, J. A. G., Oct. 28, 1913.)

CONTRACTORS: Responsibility for losses occurring before acceptance of work; provision for protecting against loss by fire pending acceptance.

A contract for the construction of a crematory provided that the contractor would be required “to maintain and operate the crematory

without cost to the Government for a period of one month, and demonstrate its ability to produce the required results," and further that the contractor would "be held responsible for all damages to the buildings whether from fire or other causes during the prosecution of the work and until the same is finally accepted." During the test contemplated by the contract and before acceptance by the Government the crematory was damaged by fire to the extent of \$300.

Held, that as the plant had not been accepted when the damage occurred, the responsibility for the loss should be placed upon the contractors.

(79-600, J. A. G., Oct. 16, 1913.)

COURTS-MARTIAL: Jurisdiction of summary and special courts; reduction in rank.

The act of March 2, 1913, relating to courts-martial, provides that (37 Stat., 722)—

"Summary courts-martial shall have power to adjudge punishment not to exceed confinement at hard labor for three months or forfeiture of three months' pay, or both, and in addition thereto reduction to the ranks in the cases of noncommissioned officers and reduction in classification in the cases of first-class privates," and the same limitation as to reduction in rank applies to special courts-martial.

Held, that a cook, not being a noncommissioned officer nor a first-class private, could not be reduced by sentence of a summary or of a special court-martial.

(30-734, J. A. G., Oct. 1, 1913.)

LINE OF DUTY: Soldier on pass; contributory negligence.

A soldier was absent from his post on pass. Two trains left the railroad station at the same time, one bound for his post and the other for other points. About the time for the trains to leave and before his pass had expired, the soldier was seen running up the street of the town toward the depot. The train going to the place not his station was just pulling out, and in endeavoring to board a freight car on said train he missed his hold, fell under the car, and received injuries from which he died the next day.

Held, that under the circumstances it might be safely assumed that the soldier mistook his train and was trying to board the train going to his station when he fell and was injured. *Held further*, that while an attempt to board a moving train is attended with danger, the amount of danger and consequent negligence in attempting to board it varies directly with the speed of the train; that the soldier in attempting to board the starting train was not necessarily guilty of such negligence as would cause him to be considered outside of a pension status; and that his death might be considered as occurring in line of duty and as not being the result of his own misconduct.

(54-022, J. A. G., Oct. 7, 1913.)

PAY OF ENLISTED MEN: Continuous service; counting service on May 11, 1908; discharge for the convenience of the Government.

A soldier enlisted May 15, 1905, and was honorably discharged May 3, 1907, for the convenience of the Government; he reenlisted the next day and was honorably discharged from this enlistment June 28, 1908, by purchase, and reenlisted August 20, 1908. His descriptive and assignment card shows the following:

"Last discharge June 28, 1908, * * * continuous service at that date three years, one month and three days."

On this record he was taken up by his troop commander as in his second enlistment period and paid accordingly.

The act of May 11, 1908, provides (35 Stat., 109)—

"But any soldier who receives an honorable discharge for the convenience of the Government after having served more than half of his enlistment shall be considered as having served an enlistment period within the meaning of this act; that the present enlistment period of men now in service shall be determined by the number of years continuous service they have had at the date of approval of this act under existing laws, counting three years to an enlistment."

Held, that the soldier on May 11, 1908, not having then served three years continuously, should be regarded as serving in his first enlistment period and must serve out his last enlistment and be honorably discharged therefrom, or be honorably discharged for the convenience of the Government after serving more than one-half thereof, and have reenlisted again within three months, before he can be regarded as having entered his second enlistment period; and that the soldier was erroneously taken up in his second enlistment period on his reenlistment August 20, 1908.

(72-515.1, J. A. G., Oct. 21, 1913.)

POST EXCHANGES: Leasing of portions of military reservations for the benefit of.

Portions of a military reservation had been leased upon shares to private individuals, the rental in kind to be turned over to the post exchange of the post, to be used by said exchange in maintaining a dairy and for feeding animals, including a small number of hogs. It was the intention to increase the number of cows so that the dairy would be able to supply organizations and individuals with dairy products, and also to increase the herd of hogs so as to supply organizations with meat.

Held, that while it has been the practice to permit military organizations to cultivate limited areas of reservations to supplement the rations furnished by the Government for the subsistence of enlisted men, it has not been the practice to lease Government lands under agreements providing for rental in kind and permitting the appropriation of the rentals by such organizations; and that the facts in this case disclosed the necessity for restricting the activities of post exchanges in business enterprises within more limited bounds.

(40-100, J. A. G., Oct. 6, 1913.)

PUBLIC PROPERTY: Personal; loaning of, to private individuals.

Upon consideration of the question as to whether or not the Secretary of War had authority to loan articles of equipment, garrison equipage, army supplies, etc., to private individuals or to State or municipal authorities, on occasions of public ceremony, parades, etc., of national or local character.

Held, that under authority given Congress in the Constitution of the United States to dispose of and to prescribe regulations respecting the territory or other property belonging to the United States, Congress had made elaborate provision for the care and accountability of public property, and that it would be contrary to the purpose of these provisions to loan public property to private individuals or to local or municipal authorities, thus committing the custody and care of such property to others than those authorized by law. Dig. Op. J. A. G., 1912, p. 908, I. I. C.

(80-140, J. A. G., Oct. 1, 1913.)

PUBLIC PROPERTY: License to take water from Government pipe line.

Application was made by the owner of property adjoining that owned by the United States in Porto Rico to tap a 4-inch Government water main supplying Henry Barracks, for the purpose of obtaining water for his home.

Held, that the request may not be granted.

(80-816.8, J. A. G., Oct. 14, 1913.)

PURCHASES: Of material of American manufacture; fortification act.

The fortification act of February 13, 1913 (37 Stat., 674), provides—

"That all material purchased under the provisions of this act shall be of American manufacture, except in cases when in the judgment of the Secretary of War it is to the manifest interest of the United States to make purchases in limited quantities abroad, which material shall be admitted free of duty."

Held, that as the statute did not define the meaning of the term "limited quantities," that question must be determined in a particular case by the officer in charge of the execution of the law, and that no definite limit could be fixed upon to apply in all cases.

Held further, that the statute lays down no rule for determining the question of whether it is to the manifest interest of the United States to make a particular purchase from abroad; that the officer charged with the execution of the law should take into consideration all the circumstances, including the item of cost, in determining this question; and that if the articles of domestic manufacture proposed to be furnished do not meet the requirements of the service, or if the price charged therefor should be unreasonable, taking into consideration the price of the foreign article with the duty added, the purchase in limited quantities might be made abroad.

(76-202, J. A. G., Apr. 5 and Oct. 13, 1913.)

QUARTERMASTER CORPS: Employment of civilians as teamsters to take the places of enlisted men.

It was proposed to employ civilians as teamsters temporarily to take the places of enlisted men of the Quartermaster Corps detailed for that purpose who might be absent in desertion or without leave or undergoing confinement as punishment.

Section 4 of the act of August 24, 1912 (37 Stat., 593), provided that not to exceed 4,000 civilian employees of the Quartermaster Corps should be "replaced permanently by not to exceed an equal number of enlisted men of said corps," and further authorized the enlistment of men in said corps for the purposes of the act, the same to be assigned to such duties pertaining to said Corps as the Secretary of War might prescribe. The law excepted from its operation certain civilian employees, among them "civil service employees and employees of the classified service," and as to the further employment of civilians provided—

"Nothing in this section shall be held or construed to prevent the employment of the class of civilian employees excepted from the provisions of this act or the continued employment of civilians included in the act until such latter employees are replaced by enlisted men of the Quartermaster Corps."

Held, that civilian teamsters did not come within any class excepted from operation of the law, and that when once they had been replaced by enlisted men of the Quartermaster Corps it was not competent to again employ civilians even temporarily to take the places of enlisted men who had replaced the civilians first employed, except perhaps under emergent conditions.

(6-224.1, J. A. G., Oct. 11 and 23, 1913.)

RETIRED OFFICERS: Exercising command at post from which regular garrison has been removed.

The question was presented as to whether a retired officer of the Army could be placed on duty in charge of a post left temporarily without its usual garrison by a movement of the troops. In a post thus left temporarily without its usual garrison there will ordinarily remain a surgeon, either of the Medical Reserve Corps or a contract surgeon, one or more enlisted men of the Hospital Corps, a number of enlisted men of the Quartermaster Corps, and probably some enlisted men of the line of the Army.

The act of April 23, 1904 (33 Stat., 264), provides that—

"The Secretary of War may assign retired officers of the Army, with their consent, to active duty in recruiting * * * and to staff duties not involving service with troops * * *."

Held, that as a retired officer placed in charge of a post under the conditions stated must exercise command over enlisted men of two or more branches of the service and also over any officer of the Medical Corps remaining at the post, the proposed assignment would involve the exercise of command and also service with troops, and would not be an assignment "to staff duty not involving service with troops;" and that the proposed assignment would not be authorized.

Advised further, that there was no other statute which would serve the purpose in view.

(88-600, J. A. G., Oct. 28, 1913.)

TAXATION: Personal property of retired Army officers on duty at an agricultural college.

A retired officer of the Army on duty at an agricultural college represented that he had been assessed and required to pay taxes on his household furniture, money in bank, and everything he owned, just "as every other citizen of the town" was supposed to pay. He alleged that he was not a citizen of the State, county, or city and had no voice in the management of their affairs, did not perform any duties except as ordered, and was not in any business.

Recommended, that the officer's attention be directed to the following extract from the Digest of Opinions of the Judge Advocates General, 1912, page 1021, B and D:

"But though a retired officer can not legally be taxed by State or municipal authorities on account of his Army pay as property or income, he is subject to be taxed for other property owned by him like any other citizen * * *."

"An officer or soldier of the Army, though not taxable officially, may be and often is taxable personally. He is not taxable by a State for his pay, or for the arms, instruments, uniform clothing, or other property pertaining to his military office or capacity, but as to household furniture and other personal property, not military, he is (except where stationed at a place under the exclusive jurisdiction of the United States) equally subject with other residents or inhabitants to taxation under the local law."

(90-152.2, J. A. G., Oct. 14, 1913.)

TRANSPORTATION: Change of station allowance of baggage; civilian employee of the Engineer Department; appropriation.

A draftsman in the employ of the Engineer Department at Large permanently changed his station under orders dated May, 1909, on account of improvement of St. Johns River, Fla. Afterwards, at his own expense, he crated and on August 23, 1913, shipped from his old to his new station his personal baggage or effects within the amount allowed by paragraph 1151, Army Regulations, 1910, for shipment for a civilian employee on change of station. He made no application either to the Quartermaster Corps or to any officer of the Engineer Corps for such packing and transportation. Paragraph 1150 of the Army Regulations provides that on change of station the authorized allowance of baggage will be turned over to the Quartermaster's Department to be packed and crated for transportation as freight by ordinary freight lines.

Held, that the regulations contemplate that the Quartermaster Corps shall render the service of packing, crating, and shipping the change of station allowance of baggage; that the employee should have applied for such services to the district engineer; and that not having done so, he could not be reimbursed in money for the expense incurred by him. 3 Comp. Dec., 304; 6 Id., 84 and 317; 15 Id., 731; 18 Id., 415.

Held further, that the regulations contemplate the shipment at or about the time of transfer of station and not a continuing obligation, and that the delay of over four years would, unless special conditions existed, be sufficient to defeat the claim.

Held further, that the expense of such shipment, if allowable, should be borne by the appropriation for the improvement of St. Johns River, Fla.

(16-400, J. A. G., Oct. 15, 1913.)

TRAVEL ALLOWANCES: Of enlisted men on discharge; transportation of effects to their homes.

Certain soldiers of the Army were discharged while they were temporarily absent on duty from their permanent stations, and it was proposed to transport their personal effects left at their permanent stations to points in the United States where they were to go, or to their homes.

Held, that the act of August 24, 1912 (37 Stat., 576), in granting certain travel allowances on discharge to enlisted men, which included the transportation of the usual amount of travel baggage to accompany the soldier, by implication, forbade the furnishing of anything in addition thereto, and that the transportation of the soldier's effects from their permanent stations to different points in the United States under the conditions stated was not authorized

(94-242, J. A. G., Oct. 7 and 20, 1913.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

COMMUTATION OF QUARTERS: Officer on leave and relieved from duty.

An officer of the Army while on duty with the Quartermaster Corps at a station where he was entitled to and received commutation of quarters, obtained a leave of absence for one month to take effect at a future date. Before availing himself of the leave he was relieved from duty with the Quartermaster Corps and directed to retain his station at said place until further orders. After entering upon his leave and before its expiration he was assigned to a regiment of Cavalry and directed on the expiration of his leave to proceed to join his organization. At the expiration of his leave he returned to his former station and on the next day proceeded to join his new station.

Held, that having been relieved from duty at his station, he was not entitled to commutation of quarters during the period of his absence on leave, his case coming within the second clause of paragraph 1324, Army Regulations, 1910. See also decision of June 18, 1913 (W. D. Bul. No. 29, p. 19).

(Comp. Geo. E. Downey, Oct. 13, 1913.)

COMMUTATION OF QUARTERS: Detail for service with the Philippine Constabulary.

An officer of the Army was paid commutation of quarters during the period he was on duty with the Philippine Constabulary, under detail in pursuance of the act of January 30, 1903 (32 Stat., 783), which provides—

“That officers of the Army of the United States may be detailed for service as chief and assistant chiefs, the said assistant chiefs not to

exceed four in number, of the Philippine Constabulary, and that during the continuance of such details the officer serving as chief shall have the rank, pay, and allowances of brigadier general, and the officers serving as assistant chiefs shall have the rank, pay, and allowances of colonel."

The Army appropriation act of August 24, 1912 (37 Stat., 575), provides—

"for commutation of quarters to commissioned officers * * * on duty without troops and stationed where there are no public quarters * * *."

Held, that as officers of the Army detailed under said act of January 30, 1903, for duty with the Philippine Constabulary do not perform military service in the line of their duty as Army officers but are performing civil duty, they should be treated as officers on leave of absence (10 Comp. Dec., 839; Dig. Op. J. A. G., 1912, p. 103); and that the officer was not entitled to the commutation of quarters paid him.

(Comp. Geo. E. Downey, Oct. 22, 1913.)

ENLISTED MEN OF THE ARMY: Deduction from pay for absence from duty on the 31st day of the month.

A private soldier was in hospital from October 29 to November 8, both dates inclusive, during which time he was not entitled to pay by virtue of the proviso in the act of August 24, 1912 (37 Stat., 572), to the effect that no officer or enlisted man in the active service shall receive pay for a period of absence from actual duty on account of disease resulting from his own intemperate use of drugs or alcoholic liquors or other misconduct. Section 6 of the act of June 30, 1906 (34 Stat., 763), after providing that persons employed in the service of the United States on an annual or monthly compensation can not be paid for the 31st day of the month, adds the proviso—

"That for one day's unauthorized absence on the 31st day of any calendar month one day's pay shall be forfeited."

Held, that pay should be deducted for 11 days, including the 31st day of the month.

(Comp. Geo. E. Downey, Oct. 3, 1913.)

ENLISTED MEN OF THE ARMY: Use of deposit made by soldier with Army paymaster.

Section 1305. Revised Statutes as amended, permits an enlisted man to make deposits of his pay with an Army paymaster, and provides that such deposits shall not be subject to forfeiture by a sentence of court-martial, but shall be forfeited by desertion, and shall be exempt from liability for the soldier's debts.

The fifty-fourth article of war provides that—

"Every officer commanding in quarters, garrison, or on the march * * * if, upon complaint made to him of officers or soldiers beating or otherwise ill-treating any person, disturbing fairs or markets, or committing any kind of riot, to the disquieting of the citizens of the United States, he refuses or omits to see justice done to the

offender and reparation made to the party injured, so far as part of the offender's pay shall go toward such reparation, he shall be dismissed from the service or otherwise punished as a court-martial may direct."

A private soldier was dishonorably discharged, with forfeiture of all pay and allowances, having \$5 deposited with a paymaster of the Quartermaster Corps. His final statements showed indebtedness to the United States less than the amount of said deposit, and also a charge for individual reimbursement, under the fifty-fourth article of war, amounting to \$73.

Held, that the Government assumes no liability for abuses committed in the manner pointed out in the fifty-fourth article of war, and that the balance of the deposit remaining, after satisfying the debts due the United States, should be paid to the discharged soldier. (Comp. Geo. E. Downey, Oct. 30, 1913.)

PRIVATE PROPERTY: Construction of the act of March 3, 1885; loss of private horse in the military service.

The act of March 3, 1885 (23 Stat., 350), authorizes the proper accounting officer of the Treasury, for the purpose of reimbursement, to examine into, ascertain, and determine the value of certain private property belonging to officers and enlisted men of the Army and which may be lost or destroyed in the military service under the following conditions:

"First. When such loss or destruction was without fault or negligence on the part of the claimant.

"Second. Where the private property so lost or destroyed was shipped on board an unseaworthy vessel by order of any officer authorized to give such order or direct such shipment; and

"Third. Where it appears that the loss or destruction of the private property of the claimant was in consequence of his having given his attention to the saving of property belonging to the United States which was in danger at the same time and under similar circumstances * * *."

The Auditor for the War Department submitted a proposed change of construction of said act, as follows:

"I am of opinion, and so decide, that the existing construction of said act should be so modified as to authorize reimbursement only in the cases where the loss falls within the 'second' and 'third' clauses of said act, without fault or negligence on the part of the claimant."

The Comptroller disapproved the proposed change of construction, but announced himself in accord with the first seven of the conclusions stated in 3 Comp. Dec. 638, setting forth the conditions which entitle a person to recover for the value of property lost or destroyed as in said act specified, and expressed his dissent from the following statement in the 19 Comp. Dec., 534:

"The law—the act of 1885, *supra*—does not require that the property, for which reimbursement is to be given the officer or soldier when lost or destroyed, shall have been lost due to any exigency of the service or any incident peculiar to the military service. All the law now requires is that it be lost or destroyed while in the military

service and owned by an officer or enlisted man in the service, and that such loss is without fault or negligence on the part of the claimant."

The Comptroller further referred with approval to the decision of the Assistant Comptroller of the Treasury in 18 Comp. Dec., 47, holding that the class of private property to which said act of March 3, 1885, relates, does not include horses belonging to officers and enlisted men in the military service, and that the accounting officers of the Treasury were without jurisdiction to receive and audit the claim of an officer or enlisted man for the loss of a horse in said service, thus overruling the decision in 19 Comp. Dec., 532, which had overruled the decision of the Assistant Comptroller.

(Comp. Geo. E. Downey, Oct. 20, 1913.)

TELEPHONE SERVICE: Installation of, in private quarters; common use of trunk line.

Three telephone trunk lines connected between the exchange of a navy yard and the city and service outside, and were used in common by public official telephones and telephones installed in the private quarters of officers at the yard. The telephone company made a separate charge for the use of telephones in the private quarters of officers, and the question was presented as to the manner of adjusting the payment of bills for the use of the trunk line.

Held, that the quarters of an officer at the navy yard must be regarded as a private residence within the meaning of section 7 of the act of August 23, 1912 (37 Stat., 414), prohibiting payment for telephone service installed in any private residence or private apartment; and that the paymaster was not authorized to pay the entire amount of the bill for the use of the trunk lines from Government funds and then to reimburse said funds from money afterwards collected from officers in whose quarters the telephones were installed, but that the charge for the rental of the trunk lines used in common should be apportioned between the officers having telephones in their quarters and the Government according to the number of telephones used by each, respectively.

(Comp. Geo. E. Downey, Oct. 6, 1913.)

TRANSPORTATION: Excess baggage on change of station; mileage status.

A disbursing quartermaster of the Army submitted for advance decision the question of the legality of payment for transportation of 200 pounds of excess baggage belonging to an officer changing station and transported on the same train. The transportation was furnished in July, 1913. It was assumed that the officer was entitled to and had received mileage for his travel. In a decision of the Comptroller's office of September 19, 1913, it was held that there was no authority of law for the transportation at public expense of the personal baggage accompanying an officer on a journey for which he receives mileage, regardless of whether the journey was on temporary duty, temporary change of station, or permanent change of station;

but that as the practice of paying for the transportation of excess baggage had been long continued, payments for such transportation by disbursing officers made not later than the 24th of September, 1913, if otherwise correct, would be passed to their official credit.

Held, that as no payment had been made, the case fell within the decision of September 19, 1913, and there was no authority for making the payment.

(Comp Geo. E. Downey, Oct. 1, 1913; see also decision of Oct. 18, 1913.)

BULLETIN 38.

BULLETIN }
No. 38. }

WAR DEPARTMENT,
WASHINGTON, December 19, 1913.

The following digest of opinions of the Judge Advocate General of the Army for the month of November, 1913, including some opinions for the month of October, 1913, not heretofore published; of certain decisions of the Comptroller of the Treasury; and of one decision of a court, is published for the information of the service in general.
(2094269 A—A. G. O.)

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

APPROPRIATIONS: Lump-sum; promotion of employees paid from; mechanics and artisans; change of duties.

It was proposed to increase the compensation of a packer at Omaha, Nebr., paid from a lump-sum appropriation, above the amount which he had been receiving during the preceding fiscal year for the same service, as coming within the exception to section 4 of the act of March 4, 1913 (37 Stat., 790), reading as follows:

"This section shall not apply to mechanics, artisans, their helpers and assistants, laborers, or any other employees whose duties are of similar character and required in carrying on the various manufacturing or constructing operations of the Government."

Held, that the packer could not be classed as a mechanic or as an artisan, and did not come within the class of employees excepted from the act, and that he was, therefore, subject to the general restrictions of the law.

It was also proposed to promote two clerks who had had additional duties imposed upon them since the beginning of the fiscal year, and who had been paid and were to be paid from lump-sum appropriations.

Held, that in order that the additional compensation might be paid the additional duties should be of a different character from those performed by them during the preceding fiscal year, but that the question of whether these duties were of such different character, or were of sufficient importance in a given case to justify the increase in compensation, was one of administration having in view the importance of the work and its permanency.

(5-075, J. A. G., Nov. 7, 1913; see also decision of Nov. 24, 1913.)

COMMUTATION OF QUARTERS: Officers assigned to station away from a hospital where they were to perform duty; service with troops.

Certain medical officers attached for duty to the Department Hospital were directed to take station at Honolulu, H. T., where they

had no duties to perform, and not at the hospital where their duties were located.

Held, that to entitle an officer to commutation of quarters it must appear that he was properly on duty without troops at a station where there were no public quarters available for his occupancy, that service at hospitals is not regarded as service without troops, and that as the officers had no duty to perform in Honolulu, they were not entitled to commutation of quarters. *Held further*, that the act of March 2, 1901 (31 Stat., 901), authorizing the Secretary of War to determine what shall constitute duty without troops within the meaning of the law relating to the payment of commutation of quarters, did not authorize him to declare as service without troops that which clearly is not of such character, but only vested him with the function of determining the degree of military control or discipline which might be exercised as between officers or by officers over enlisted men, to constitute such service.

(72-330, J. A. G., Nov. 8, 1913.)

CONTRACT SURGEONS: Cost of subsisting while messing on vessel was temporarily suspended.

A contract surgeon of the Army had been subsisted at public expense in the saloon mess of an Army transport on which he was performing duty, and desired an increase of \$1 per day in compensation as reimbursement for subsistence during a short period while messing on the vessel had been suspended, during which time he subsisted himself. Said amount was the price charged to officers paying for their own subsistence in the saloon mess.

Contract Surgeons are employed under authority of paragraph 1413, Army Regulations, 1910, which provides:

"Civilian physicians * * * may be employed as contract surgeons * * * under contracts entered into by or with the authority of the Surgeon General of the Army. They are entitled to the transportation and fuel allowances of first lieutenants, and when on duty at a post or station where quarters in kind are provided by the United States they will be entitled to the quarters allowed by regulation * * *."

The contract in this case followed the regulation.

Held, that the purport of the regulation and contract was to place a contract surgeon in the position of a commissioned officer as to his compensation, except as limited by the statute, and as a commissioned officer in a similar situation would not have been entitled to any allowance for his subsistence, there was no authority for allowing it to a contract surgeon.

(6-227.5, J. A. G., Nov. 25, 1913.)

CONTRACTORS: For material to be used on public works; treatment of employees.

Complaint was made that the Government was employing a contractor for the manufacture of material to be used at a lock and dam, which mistreated the men working for it "contrary to all rules of justice and right."

Held, that neither the law nor the contract for the construction of the lock and dam authorized the Department to interfere with the control by the contractor of its plant, and as the law stood the Department could not insert in any contract for future work a provision which would purport to give the Government control of such matters, since the effect would be to restrict competition and lead to higher prices, contrary to the intent of the law which requires contracts to be let to the lowest bidder and under conditions which will insure reasonable prices.

(76-710, J. A. G., Nov. 24, 1913.)

CONTRACTS: Excuses for delays in performance; purchase against contractor; flood conditions.

A contract for delivery of fresh beef at Columbus Barracks, Ohio, gave the Government the right in case of failure of the contractors to make deliveries as required by their contracts—

“to supply by purchase in open market or otherwise any deficiency resulting from such failure.”

The contractors having failed to deliver beef in accordance with their contract, there was purchased in open market a certain quantity of fresh beef, and the difference between the purchase price and the contract price was deducted from the amount due the contractors. The latter raised the question as to whether the deduction was proper in view of the fact that the failure to deliver was the result of delayed trains due to flood conditions which prevailed at the time.

Held, that as the contract contained no provision excepting failure in delivery caused by delays in transit on the part of transportation companies, there was no authority for granting the relief requested.

(76-600, J. A. G., Nov. 10, 1913.)

CONTRACTS: Cancellation for failure to comply with terms of; rights of the United States.

A contract was entered into with a firm for supplying fresh meat at an Army post. The prices did not allow much margin for profit, and difficulty was experienced in enforcing compliance with the specifications relative to weights and condition of meat delivered. Frequent rejections resulted for failure to supply meat according to specifications, and frequent purchases were made against the contractor for failure to supply meat under the contract. It was, therefore, recommended that the contract be annulled, and that proposals be issued for a new contract, the firm in question not to be awarded contracts in the future. It was conceded that the price under the contract was less than that which could probably be obtained by reletting the contract, and that aside from the trouble of enforcing compliance with the existing contract, the action proposed would not be for the best interests of the Government.

Held, that the contract could not legally be annulled; that the contractors should be held to a compliance with its terms; and that upon failure to do so, the usual remedies reserved by the contract should be invoked against them. 9 Op. Atty. Gen. 81.

(76-731, J. A. G., Nov. 17, 1913.)

COURTS-MARTIAL: Constitution of; member as witness for the prosecution.

The act of March 2, 1913 (37 Stat., 722; W. D. Bull. No. 7, Mar. 15, 1913, p. 30), provides that—

"* * * the commanding officer of a territorial * * * department, * * * may appoint general courts-martial whenever necessary; but * * * no officer shall be eligible to sit as a member of such court when he is the accuser, or a witness for the prosecution."

A private soldier who was brought before a general court-martial for trial, challenged a member of the detail for the court on the ground that he was a witness in the case, had had to do with the preferring of the charges, and had taken part in investigating the case. The officer challenged replied that he had taken no part in the investigation of the case, had formed no opinion as to the guilt or innocence of the accused, and believed that he could give a true verdict in the case. The challenge was not sustained by the court, and the officer was sworn as one of six members of the court for the trial of the case. Subsequently the officer was called as a witness for the prosecution, was sworn, and gave testimony. It did not appear that he was excused from further duty as a member of the court upon being called as a witness for the prosecution.

* In another case a soldier was brought before a general court-martial for trial upon four charges, to three of which he pleaded guilty, but to one, a charge of desertion, he pleaded not guilty but guilty of absence without leave. In the course of the trial a member of the detail for the court who had been sworn as a member of the court, was called as a witness for the prosecution, was sworn, and gave testimony. It did not appear that he was excused from further duty as a member of the court upon being called as a witness for the prosecution.

Held, that a court composed either wholly or partly of officers statutorily ineligible to sit as members thereof, is not a lawful court; and that when a member who has become statutorily ineligible participates thereafter in the trial, the court thereupon ceases to be a lawful one, and is therefore incompetent to proceed with the trial, to arrive at a finding, or to adjudge a sentence.

(30-435, J. A. G., Oct. 11 and Nov. 13, 1913.)

COURTS-MARTIAL: Jurisdiction of special courts-martial; capital offenses.

A private soldier pleaded guilty before a special court-martial to the charge of sleeping on post, in violation of the Thirty-ninth Article of War, and was sentenced to be confined at hard labor for three months and to forfeit the sum of \$10 per month for the same period. The Thirty-ninth Article of War provides that—

"Any sentinel who is found sleeping upon his post, * * * shall suffer death, or such other punishment as a court-martial may direct."

The act of March 2, 1913, establishing special courts-martial, provides (37 Stat., 722) that—

"Special courts-martial shall have power to try any person subject to military law, except an officer, for any crime or offense not capital made punishable by the Articles of War."

Held, that the offense charged in said case, being a capital one, was beyond the jurisdiction of a special court-martial, and that the proceedings, findings, and sentence were illegal and void. *Advised*, therefore, that the soldier be released from confinement under the sentence, and that proper entries be made upon muster and pay rolls and other records to indicate that the sentence was illegal and void. (30-750, J. A. G., Oct. 13, 1913.)

DETACHED SERVICE: Assignment to duty on transports, of officers traveling thereon who are not eligible for detached service in general.

Upon inquiry as to whether officers traveling on transports in compliance with orders to join their companies from detached service or in compliance with orders to change station from one company assignment to another, but who are ineligible for detached service in general by reason of the detached-service legislation of August 24, 1912 (37 Stat., 571), may be assigned to duty on board said transports.

Held, that the assignment of duties to be performed during the regular course of his journey by an officer *en route* from detached service to a company assignment or *en route* from one company assignment to another, can not be regarded as in violation of the detached-service legislation of August 24, 1912, if the due prosecution of the journey be not interfered with; that is, the detached-service legislation does not prevent the proper superior from requiring of an officer thus engaged any duty which will not serve to divert him from his proper route in complying with his orders to change station or to delay him in reporting for duty in person under his company assignment.

(94-100, J. A. G., Nov. 6 and Nov. 19, 1913.)

DISCIPLINE: Punishment; computation of time of sentence and abatement.

In the case of a prisoner under sentence approved October 9, 1913, of imprisonment for five months, inquiry was made as to whether the provision in paragraph 957, Army Regulations, 1910, as amended, that in computing abatement of terms of confinement "all months will be assumed to consist of 30 days," refers to abatement only or to both abatement and sentence.

Held, that said provision is to be construed as applicable in the computation of both sentence and abatement; and that the prisoner's sentence would expire on February 13, 1914, in case he earned the maximum abatement for good conduct.

(30-823.4, J. A. G., Nov. 5, 1913.)

DONATIONS: Of personal property to the United States.

The citizens of a certain city desired to present a national flag and pennant to a new dredge of the United States to show their appreciation of the fact that the dredge had been named for their city.

Held, that the flag and pennant might lawfully be accepted by the Government for use on the dredge. Dig. Op. J. A. G., 1912, p. 912; C-29257, Mar. 9, 1912.

(80-111, J. A. G., Nov. 11, 1913.)

MEDICAL RESERVE CORPS: Beginning of active service and pay; ratification of assignment of officer to active service.

Section 7 of the act of April 23, 1908 (31 Stat., 68), provides for a Medical Reserve Corps, to be composed of graduates of reputable schools of medicine, citizens of the United States, who shall, upon an examination to be prescribed by the Secretary of War, be found qualified for service in said corps. The members of this corps receive no pay unless called into active service. Section 8 of said act provides that—

"In emergencies the Secretary of War may order officers of the Medical Reserve Corps to active duty in the service of the United States in such numbers as the public interests may require," providing the officers are willing to accept said service.

An officer of the Medical Reserve Corps was assigned by special orders to active duty, but before receipt of such orders he entered upon active duty under orders of the chief surgeon of a department who acted by authority of a telegram from the Surgeon General of the Army.

Held, that the officer could only receive pay after he had entered upon duty by proper authority, either at the post where he was assigned to duty or by starting to go there in pursuance of such orders; *held further*, that the action of the department surgeon in placing the officer on active duty before the receipt of special orders from the War Department, might be ratified by the Secretary of War, in which event the officer would be placed in the same situation as though his employment had originally been authorized by the Secretary.

(6-2274, J. A. G., Nov. 13, 1913.)

RETIRED OFFICERS: Assignment to educational institution; right to allowances as mounted officer.

A major on the retired list of the Army was assigned to active duty as professor of military science and tactics at the university of a State, pursuant to the provisions of section 1225, Revised Statutes, relating to the assignment of officers of the Army to duty as professors, etc., at educational institutions, as amended by the act of November 3, 1893 (28 Stat., 7), which provides that—

"Officers on the retired list of the Army may upon their own application be detailed to such duty and when so detailed shall receive the full pay of their rank."

The act of March 3, 1909 (35 Stat., 738), provides with reference to retired officers so detailed, that they shall "receive the full pay and allowances of their rank," with certain limitations upon the pay of officers above the grade of major.

Par. 3, Cir. 81, W. D., September 30, 1908, specifies that—

"Officers of the Army on the retired list who may be detailed to active duty * * * as professors of military science and tactics at educational institutions, are not required to be mounted."

The officer claimed that his duties required him to be mounted, and requested that his particular service be declared to be of that character and that he be allowed forage and stabling for two horses kept by him and used on said duty.

Held, that there was nothing in the character of the service as described in the law which required that an officer detailed as professor or instructor at an educational institution should be mounted; that the Secretary of War was not authorized to give such service a character different from that implied in the law by declaring the same to require the services of a mounted officer; and that the officer's request should be denied.

(72-140, J. A. G., Nov. 12, 1913.)

RETIREMENT: Of enlisted men; counting time for service in the Philippine Scouts.

An officer of the Philippine Scouts who had had previous service as a commissioned officer but not as an enlisted man, first in the State Volunteers and then in the United States Volunteers in the Spanish War, desired to know whether his service as an officer in the Philippine Scouts could be counted as double time in computing his time for retirement as an enlisted man of the Army, under the act of March 2, 1907 (34 Stat., 417), in connection with the acts of June 30, 1902 (32 Stat., 512), and June 12, 1906 (34 Stat., 248). The act of May 26, 1900 (31 Stat., 209), provides that:

"Hereafter in computing length of service for retirement credit shall be given the soldier for double the time of his actual service in Porto Rico, Cuba, or in the Philippine Islands."

Held, that the acts allowing service with the Philippine Scouts to be counted in computing time necessary to enable an enlisted man of the Regular Army to retire, are applicable only to commissioned officers of the Philippine Scouts who have had previous service as enlisted men in the Regular Army, and who may return to the ranks of the Regular Army; and that should this officer resign his commission in the Philippine Scouts and enlist in the Army, he would not thereafter, upon application for retirement, be entitled to count his commissioned service in the Philippine Scouts.

(88-800, J. A. G., Oct. 25, 1913.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

ACCOUNTABILITY: Disbursement of public funds; manner of payment in foreign countries.

A decision was requested as to whether or not a disbursing officer was authorized to pay a creditor of the United States residing in a foreign country by bill of exchange or draft purchased from a bank, in a case where payment was to be made in foreign currency or where the purchase had been made at a given price in the country of purchase.

Held, that the purchase of a bill of exchange or draft to be sent to a public creditor residing in a foreign country was not authorized as a payment of the creditor, and that payment of such creditors should continue to be made as indicated in the decision of December 4, 1907

(14 Comp. Dec., 339); that is, in the manner prescribed in circular No. 52, Treasury Department, of July 29, 1907, or by international post-office money order.

(Comp. Geo. E. Downey, Nov. 6, 1913.)

COMMUTATION OF QUARTERS: Service with troops while temporarily absent from station at which no duties were to be performed.

Certain officers of the Army while on duty at posts where they were not entitled to commutation of quarters, were directed to take station at Manila, P. I., where no quarters were available for their occupancy and where they had no duties to perform. Upon arrival there they were immediately directed to proceed to various points mentioned for temporary survey duty with troops. It was not necessary for them to maintain or have quarters in Manila, and after the performance of the temporary duty they were to return to the posts where they had at first been stationed. Commutation of quarters was claimed as being temporarily absent from their station at Manila on duty in the field.

Held, that the orders directing the officers to take station at a place where they had no duties to perform and while their duties required them to be elsewhere, could not operate to give them a right to commutation of quarters, and the action of the Auditor for the War Department disallowing such commutation was affirmed.

(Comp. Geo. E. Downey, Nov. 10, 1913.)

DISBURSING OFFICERS: Crediting payments made under rulings in force at the time; heat and light allowances.

A disbursing officer made payments for heat and light supplied to an Army officer's family living in San Francisco, Cal., from November 16, 1911, to January 13, 1912, while the officer himself was stationed with his regiment in the Canal Zone, upon the certificate of the officer that the public quarters occupied by him were not heated and lighted at Government expense and that no part of his heat-and-light allowance for said period was otherwise drawn by him. In a decision of the Comptroller's Office, dated October 13, 1910, it was held that where an officer on duty in the Philippines occupied quarters not heated at Government expense, the fuel allowance to which he was entitled in the Philippines might be issued to his family in the United States. This decision was subsequently overruled by decisions rendered subsequently to the time when the above payments were made.

Held, that the later decisions could not operate to deny credit to a disbursing officer who had made payments for heat and light furnished under regulations and decisions in force at the time of payment; and that credit should be given him for such payments, not in excess of the amounts allowable under such regulations and decisions; but that this rule would not necessarily apply to the officer who received the unauthorized payments, and in the future the accounting officers would be warranted in taking into consideration such unauthorized payments in settling for anything which might be due the officer.

(Comp. Geo. E. Downey, Nov. 13, 1913.)

PAY OF ARMY: Increase for foreign service; physical presence in the United States.

The act of June 30, 1902 (32 Stat., 512), provides:

"That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto."

The Auditor for the War Department submitted a modification of the existing construction of said law by deciding that no officer or enlisted man of the Army who is physically present in the United States can receive foreign-service pay under said act. The Auditor's decision was approved, thus reversing the decision of the Assistant Comptroller of June 28, 1907 (13 Comp. Dec., 884), but that no injustice might be done, *held*, that where payments had theretofore been made by disbursing officers under the former ruling of the Comptroller such payments would be passed to their credit.

(Comp. Geo. E. Downey, Nov. 20, 1913.)

REPAIR OF BUILDINGS: Of the Engineer Department used as barracks and quarters; appropriation.

Two buildings of the Engineer Department located at Fort Flagler, Wash., not being required for immediate use by that Department, were turned over to the quartermaster of the post and were used as quarters for troops. It was contemplated that the buildings would be again needed for the Engineer Department, which department, for that reason, declined to relinquish control of them, but refused to make interior repairs.

Held, that the payment for the necessary repairs to said buildings while so occupied as quarters was authorized from the appropriation for "Barracks and Quarters" contained in the act of March 2, 1913 (37 Stat., 714).

(Comp. Geo. E. Downey, Nov. 17, 1913.)

TRANSPORTATION: Professional books as household effects on changing station.

A railroad company transported the personal property of an officer of the Army changing station which property consisted, besides various articles of equipment and household furniture, of a quantity of professional books, all apparently loaded into one car. The company contended that the professional books were not properly included in household goods entitled to carload ratings, and that payment should be made therefor in addition to the carload rate allowed for the remainder of the shipment.

Held, that while for administrative purposes professional books were segregated by Department regulations from other household goods of an officer changing station, yet as the term was used in rail-

road classification, it embraced all articles which were reasonably necessary and proper for the maintenance of a home and included professional books. The claim was disallowed.

(Comp. Geo. E. Downey, Nov. 6, 1913.)

TRANSPORTATION: Party rates where transportation request called for a less number.

A transportation request called for the transportation of nine persons between two points on first-class limited tickets. But one ticket was issued and the men traveled together as a party. There was a party rate in force between the points for parties of not less than ten, and the party rate for ten persons was less than the total of the single fares for nine.

Held, that there being no party rate in force for nine persons traveling together, the railroad company was entitled to a single fare for each person transported on the request, and that the quartermaster was in fault in not issuing a request for a ten-party rate ticket.

(Comp. Geo. E. Downey, Nov. 14, 1913.)

OPINION OF THE COURT.

(Digest prepared in the office of the Judge Advocate General.)

CONTRACTS: Execution of; enforcing parol contract with United States.

Section 3744, Revised Statutes, provides:

"It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof."

An action was brought by the United States to recover damages for breach of an alleged contract by which a steamship company agreed to furnish two steamers to transport for the United States not less than 8,000 tons of coal from Atlantic ports to San Francisco, Cal.

Held, that such statutory provision was not merely for the benefit of the Government, but was mandatory, and hence the United States could not recover damages for breach of a steamship company's parol contract to carry coal to Pacific ports in accordance with the steamship company's bid, where it refused to enter into a contract in writing when tendered.

(*New York & P. R. S. S. Co. v. United States*, United States Circuit Court of Appeals, 206 Fed. Rep., 443.)

BULLETIN 1.

[NOTE.—Bulletin No. 38 is the last of the series for 1913.]

BULLETIN }
No. 1. }

WAR DEPARTMENT,
WASHINGTON, *January 20, 1914.*

The following digest of opinions of the Judge Advocate General of the Army for the month of December, 1913, including some previous opinions not heretofore published, of certain decisions of the Comptroller of the Treasury, and of decisions of courts, is published for the information of the service in general.

[2094269, B—A. G. O.]

• BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

CLAIMS: For assisting in extinguishing a fire on a Government vessel; salvage.

The captain of a private vessel rendered assistance with his vessel in extinguishing a fire which broke out on a Government boat, and in so doing sustained damages in the loss of personal property, for which he claimed compensation.

Held, that if it be shown that the Government vessel was in real danger of destruction or of serious damage from the fire, and the service was rendered voluntarily in saving the vessel from such danger, the claim might be treated as one in the nature of salvage and paid accordingly, provided the service was not rendered as a part of the claimant's regular duty.

(18-400, J. A. G., Dec. 1, 1913.)

DISCHARGE: By purchase; date when right becomes effective; discharge away from permanent station.

War Department General Order 23 of March 28, 1913, fixed for discharges by purchase after 11 years' service a rate of \$30 for the United States and \$80 for the Philippine Islands. Prior to said order the rate was \$30 for like length of service regardless of place of discharge.

A soldier stationed in the Philippine Islands went on furlough for three months, and while in the United States on said furlough and two days before the date of General Order No. 23, applied for his discharge by purchase. His application having been approved, he

was discharged April 17, 1913, at Fort McDowell, Cal., to which post he had reported for duty three days before, relinquishing the balance of his furlough. He was not relieved from duty in the Philippine Islands nor assigned to any permanent station in the United States.

Held, that the soldier's rights should be adjusted as of the date of his application, and that he should be charged only the rate in force at the time of such application; but that for the purposes of General Order No. 23 he should be regarded as serving in the Philippine Islands until his service in the United States had been regularized by assignment to some permanent station.

(28-224, J. A. G., Dec. 29, 1913.)

PARDON: Power of; remission; restoration of files after promotion of another officer.

An officer had been sentenced to dismissal, but the sentence was commuted by the President to a reduction of 50 files in lineal rank. He was afterwards promoted, and while serving in another grade than that in which he was serving at the time of sentence applied for a remission of the sentence reducing him in files.

Held, that the promotion to another grade of officers who gained by this officer's reduction in files rendered the sentence of reduction fully executed and placed it beyond the power of remission or pardon.

(68-111.1, J. A. G., Dec. 23, 1913.)

POSTAL SERVICE: Use of penalty envelopes in transmitting books belonging to a department headquarters library.

Section 5 of the act of March 3, 1877, reads in part (19 Stat., 335):

"That it shall be lawful to transmit through the mail, free of postage, any letters, packages, or other matters relating exclusively to the business of the United States."

The act of July 5, 1884 (23 Stat., 158), extends this provision to all officers of the United States Government, not including members of Congress, the envelopes in all cases to bear appropriate indorsements containing the proper designation of the office from which, or the officer from whom, the same is transmitted, with a statement of the penalty for its use.

Held, that books belonging to the department headquarters library such as would be of professional benefit to officers of the Department might be sent through the mail under the authority of said statute to the officers on duty in the department and mailed by them in return, under the official frank of the department.

(22-020, J. A. G., Dec. 11, 1913.)

RETIREMENT: Philippine Scouts.

An officer of the Philippine Scouts applied for retirement under the provisions of section 1243, Revised Statutes, claiming that he had served over 30 years, 17 on the western frontier and 13 in the tropics.

Held, that the law which fixes the pay and allowances of Philippine Scouts the same as those authorized for officers of like grade in the Regular Army, did not include the privilege of retirement, and that the retirement of the officer could only be accomplished through an act of Congress. Dig. Ops. J. A. G., 1912, p. 987, 5a.
(6-250, J. A. G., Dec. 2, 1913.)

RETIREMENT: Promotion for service other than as a cadet; picket duty at West Point, N. Y.

Certain officers of the Army now retired applied for promotion of one grade in rank "for services in the Civil War rendered otherwise than as a cadet" under the provisions of the act of April 23, 1904 (33 Stat. 264), which authorizes the retirement or advancement on the retired list of one grade above the rank held at the time of retirement of officers below the grade of brigadier general who served in the Regular or Volunteer forces during the Civil War prior to April 9, 1865, "otherwise than as a cadet." Said officers were cadets at West Point, N. Y., during the draft riots in New York City in 1863, and while the academic studies were suspended at the academy they were assigned to picket duty with instructions to watch for rioters in boats, who according to rumors, intended to visit and destroy Cold Spring Foundry, then the largest establishment for making guns in the country, and at the same time to visit and destroy West Point.

Held, following a previous opinion of this office (C. 21468, J. A. G., May 1, 1907), that the service rendered was service as a cadet, and that the request must be denied.
(88-410, J. A. G., Dec. 5, 1913.)

TRANSPORTATION: Signing request; delegation of authority.

A request for transportation issued from the office of a quartermaster was countersigned in the name of the quartermaster by the post quartermaster sergeant in charge of the office in his absence, the post quartermaster sergeant adding his own name.

Held, that the regulations contemplate the final issue of transportation requests by commissioned officers of the Quartermaster Corps; that the law authorizing the appointment of post quartermaster sergeants did not authorize such sergeants to perform any duty imposed upon commissioned officers; and that the duty of countersigning transportation requests required the exercise of judgment and discretion which could not be entrusted by the officer to others. *Held further*, that as the officer had ratified the action of the post quartermaster sergeant in signing his name to the transportation request, no question could be raised as to the validity of a claim for transportation furnished thereunder, *but advised* that the practice be discontinued for the future.

(94-201, J. A. G., Dec. 10, 1913.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

ABSENCE: On account of sickness in family; civilian clerk.

A clerk in the office of the officer in charge of public buildings and grounds was absent 4 days on account of a death occurring in his family. During the year he had already taken 30 days annual leave, but had taken but 6½ days leave on account of personal illness, and had worked 51 hours overtime, or beyond 7 hours per working day.

Section 7 of the act of March 15, 1898 (30 Stat., 316), requires that the heads of the several executive departments shall exact of all clerks and employees in their respective departments not less than 7 hours of labor each day, except on Sundays and public holidays, and further provides as follows:

"The head of any department may grant thirty days' annual leave with pay in any one year to each clerk or employe: *And provided further*, That where some member of the immediate family of a clerk or employe is afflicted with a contagious disease and requires the care and attendance of such employe, or where his or her presence in the department would jeopardize the health of fellow-clerks, and in exceptional and meritorious cases, where a clerk or employe is personally ill, and where to limit the annual leave to thirty days in any one calendar year would work peculiar hardship, it may be extended, in the discretion of the head of the department, with pay, not exceeding thirty days in any one case or in any one calendar year."

Held, That said law made no provision for the granting of absence other than as specified, and did not authorize the granting of a leave for the cause stated; that it was within the discretion of the head of the department to require the so-called overtime work; and that the law made no provision for the extension of leave on account of such overtime. The claim for pay for the time of such absence was disallowed.

(Comp. Geo. E. Downey, Dec. 8, 1913.)

APPROPRIATIONS: Use of; construction and repair of hospital; estimates.

The Army appropriation act of March 2, 1913 (37 Stat., 717), appropriated:

"For construction and repair of hospitals at military posts already established and occupied * * * and for the construction and repair of general hospitals and expenses incident thereto, and for additions needed to meet the requirements of increased garrisons, \$450,000."

The estimates upon which this appropriation was based contained an explanatory note stating the purposes for which the entire sum appropriated was to be used. It was proposed to expend a portion of this appropriation for the construction of better cantonment accommodations for the sick at Texas City, Tex. The estimate did not include provision for the construction of temporary hospitals in camp, neither was any express provision therefor made in the appropriation act.

Held, that said appropriation was not available for the construction of temporary hospitals in camp.
(Comp. Geo. E. Downey, Dec. 8, 1913.)

COMMUTATION OF QUARTERS: At temporary station while retaining quarters at permanent station.

An officer in occupancy of public quarters at his permanent station was ordered to report to the commandant of the Army Service Schools at Fort Leavenworth, Kans., for a special course in tactics, and on completion of the same to rejoin his proper station. The Secretary of War advised the commandant by telegraph that any available quarters might be used for the accommodation of the officer, and that if none were available commutation was authorized. The commandant reporting that no quarters were available for him, commutation was paid, and the amount having been disallowed by the auditor, was refunded by the officer. The officer claimed commutation by virtue of the provisions of paragraph 1325, Army Regulations, 1910, which provided that:

"An officer does not lose his right to quarters or commutation at his permanent station by a temporary absence on duty. While he continues to claim and exercise that right, he can not legally demand quarters or commutation thereof at any other station.

"The mere fact that an officer's family or his household goods are permitted by proper authority to remain in quarters at a military station does not prevent the assignment of quarters to him where he is actually serving, or debar him from commutation if he is on duty without troops at a station where there are no public quarters. In these exceptional cases commutation of quarters will be allowed only on the approval of the general commanding the troops in the Philippine Islands in cases arising in his command; in all other cases on the approval of the Secretary of War after recommendation by the department commander * * *."

Held, that it was doubtful whether the regulation applied to a case of this kind, but that if it did, it transcended the law which did not entitle an officer to commutation of quarters at his temporary station in addition to public quarters at his permanent station (19 Comp. Dec., 73); and that the telegram of the Secretary of War, if it be considered as an attempt to authorize payment of such commutation, was without effect.

(Comp. Geo. E. Downey, Dec. 23, 1913.)

CONTRACTS: Bailee for hire; liability of the Government for damages.

A barge belonging to a private company was in use in connection with repairs being made to a certain lock on the Kanawha River, W. Va. In unloading a derrick boom the Government engineer lost control of his engine and allowed the timber to fall, which broke into two pieces, one piece going to the bottom of the barge breaking some boards and causing it to sink. It was reported that the accident was partly due to a defect in the broken timber, but it was not shown that the engineer was at fault or careless, or that he was incompetent, or that the engine was defective or out of repair.

Held, That the Government, being a bailee for hire, should be held only to the exercise of ordinary care and was liable only for ordinary negligence in the care and use of the property hired; and that it did not become the insurer of the barge, and was not liable for damages brought about by unforeseen causes which could not be guarded against. *Held further*, that the liability of the Government did not appear from the facts presented, but that it appeared that the damage was occasioned by an unavoidable accident for which, under the circumstances, the Government was not responsible.

(Comp. Geo. E. Downey, Nov. 22, 1913.)

DECISIONS OF THE COURTS.

(Digests prepared in the office of the Judge Advocate General.)

EXTRA-DUTY PAY: Service as telegraph operator; sufficiency of designation.

A private soldier of the Hospital Corps was on November 9, 1900, placed in charge of the telegraph and telephone office at a general hospital by orders of the surgeon commanding the hospital, and performed the duties of said position until September 25, 1902. At no time while performing the duty of telegraph operator was he under the supervision of anyone connected with the Signal Corps, but remained under the orders of the medical officer commanding at the hospital. The muster rolls during the time of this service reported him as "telegraph operator."

Section 1287, Revised Statutes, provides that:

"When soldiers are detailed for employment as artificers or laborers in the construction of permanent military works, public roads, or other constant labor of not less than 10 days' duration, they shall receive in addition to their regular pay," certain compensation.

The act of July 5, 1884 (23 Stat., 110), appropriated for extra-duty pay at the rate of 50 cents per day for mechanics, artificers, school teachers, and clerks at Army, Division, and Department headquarters, and at the rate of 35 cents per day "for other clerks, teamsters, laborers, and others." The act of March 3, 1885 (23 Stat., 359), fixed the rates of compensation as above specified, adding after the word laborers "other enlisted men on extra duty."

Held, That the last two acts mentioned were intended as amendments to Section 1287, Revised Statutes, and were not limited to the Quartermaster's Department; and that the fact that this man was ordered to the particular duty by his superior officer and was carried on the rolls as a telegraph operator for the time of his service as such, amounted to a sufficient designation or detail by competent military authority to entitle him to extra-duty pay for said service. *Holthaus case*, 42 C. Cls., 544; 14 Comp. Dec., 151. The claimant was given judgment for extra-duty pay at the rate of 35 cents per day.

(*Ross v. United States*, No. 24889, C. Cls., Dec. 1, 1913.)

PRISONERS: Parole; good-time allowance.

The act of June 21, 1902 (32 Stat., 397), provides that each prisoner confined in execution of a sentence in any United States penitentiary, whose record justifies it, shall be entitled to a deduction

for good time, commencing from the first day of his arrival at the penitentiary. The act of June 25, 1910 (36 Stat., 819), declares that every prisoner confined for a term of more than one year, whose record shows an observance of the prison rules and who has served one-third of his term, may be released on parole. Section 3 declares that the parole shall be granted on such terms as the board of parole shall prescribe, the prisoner to remain while on parole in the legal custody and under the control of the warden of the prison from which he is paroled and until the expiration of the term or terms specified in his sentence, less such good-time allowance as is provided. The act also provides for the retaking of a paroled prisoner who has violated his parole, at any time within the term or terms of his sentence, and for a hearing before the board, which may revoke the order and terminate the parole, and, if revoked, the prisoner shall serve the remainder of the sentence imposed, the time the prisoner was on parole not being taken into account to diminish the time of his sentence.

A petitioner for a writ of habeas corpus was released on parole August 12, 1911, in accordance with the act of Congress of June 25, 1910, having earned 216 days good-time allowance, as provided by the act of June 21, 1902. He was returned to confinement in the penitentiary May 29, 1912, on account of a violation of his parole and for failure to faithfully observe the rules governing him as a convict on parole. It was claimed that his good-time allowance was forfeited by a violation of his parole.

Held, That "legal custody" and "control" did not contemplate actual custody or confinement of a paroled prisoner, and that such a prisoner was not subject to prison rules providing for a forfeiture of good-time allowance by a breach of such rules, so that on his return for breach of parole he was not subject to a forfeiture of his good-time earned, in determining the date of the expiration of his sentence.

(*Ex parte Marcil*, 207 Fed. Rep., 809.)

BULLETIN 5.

BULLETIN }
No. 5. }

WAR DEPARTMENT,
WASHINGTON, *February 18, 1914.*

The following digest of opinions of the Judge Advocate General of the Army for the month of January, 1914, of certain decisions of the Comptroller of the Treasury, and of a decision of a court, is published for the information of the service in general.

[2094269 C—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

CONTRACTS: Agreement to transport; liability of the Government.

A contract was entered into with a company at Fort McDowell, Cal., for the installation of a rock-crushing plant, one paragraph of the specifications providing that "transportation from Fort Mason dock to site at Angel Island will be furnished by the Government," except certain articles not involved in the question here presented. A box containing belting and an electric switch was delivered by the contractor for transportation, and was received on board a vessel under the control of the Army Transport Service. This box was not delivered at its destination, and after strict search could not be found.

Held, that in furnishing the transportation in question the Government did not assume the liability of a common carrier and was not an insurer against the loss of the property, but having undertaken to transport the property of the contractor between the points mentioned, on failing to do so after due delivery to it for that purpose, it became liable under its contract for the delivery of the property or for an amount of money sufficient to replace it.

(76-741, J. A. G., Jan. 9, 1914.)

CONTRACTS: Eight-hour law; construction of vessels; public works.

The eight-hour law of March 3, 1913 (37 Stat., 726), prescribes an eight-hour day for certain kinds of labor upon any public work of the United States, with penalties for violations. It was proposed to enter into a contract with a company for the construction of certain steel barges in connection with the improvement of the Ohio River,

the contract providing for a payment of 50 per cent of the contract price of each barge when it should have been provisionally accepted by the United States, at the builders' yard, when, as stated, the barges would be practically completed, and upon such payment would become the property of the United States. Final acceptance and delivery of the barges was to be made to the contracting officer at Louisville, Ky. It was desired to know whether work upon the barges should be regarded as being rendered upon a public work of the United States within the meaning of said act.

Held, that prior to said partial payment and acceptance the barge did not become the property of the United States, and work thereon was not rendered upon a public work of the United States within the meaning of the statute, but that work done after such partial acceptance, in the correction of any defects that might develop between the provisional acceptance and final acceptance, would be rendered upon a public work of the United States.

It was also desired to know whether or not the contract for the construction of the barge or vessel would be a contract for a public work, provided the contract stipulated for payment in a lump sum of the entire contract price after final acceptance of the barge.

Held, that such stipulation would more clearly indicate that the title to the vessel would not pass to the United States and that prior to acceptance and payment it could not be regarded as a public work within the meaning of the statutes.

(32-213, J. A. G., Jan. 9, 1914.)

EMPLOYEES: Compensation for injuries; general prisoners.

A former private in the Army who had been dishonorably discharged therefrom by sentence of general court-martial desired to know whether or not he could get anything on account of his arm having been broken while at work in prison at Alcatraz, Cal.

Held, that it is clear that the injury received by the soldier while serving as a general prisoner did not come within the provisions of the employees' compensation act of May 30, 1908 (35 Stat., 556), as the labor he was performing at the time of his injury was not based upon any contractual relation between himself and the Government, but was rendered as a punishment for military offenses

(18-300, J. A. G., Jan. 21, 1914.)

HEAT AND LIGHT: Sale of fuel allowance to officers' families.

Army Regulations formerly provided for the issue and sale of the fuel allowance of an officer to his family under certain conditions. Following the decision of the Comptroller of the Treasury (W. D. Bul. No. 1, 1913, p. 35) that the authorized fuel allowance to officers could not be issued to their families separate and apart from the officers, the Army Regulations upon the subject were amended so as to omit provision for such sale and issue.

Held, that under the authority of the appropriation for regular supplies contained in the various Army appropriation acts, sales of fuel might still be made to officers for use of their families during

their temporary absence from their post or station where their families might be located, but that such sale should be made at the cost price and not at the arbitrary price fixed by the original regulations. (72-316, J. A. G., Jan. 3, 1914.)

HEAT AND LIGHT: At permanent station; officer absent on temporary duty.

An officer of the Army expected to be absent from his permanent station on temporary duty in the field with his regiment, and desired that his fuel allowance while he was so absent should be delivered to his family, who would occupy his quarters at his permanent station, he certifying that during such absence he would not avail himself of his fuel allowance elsewhere.

Held, that while the law makes no provision for heat and light furnished the family of an officer separate and apart from the officer, if his family continues to occupy his quarters at his permanent station while he is absent on temporary duty, he is entitled to have such quarters heated at public expense so long as they are so occupied, provided his quarters at his temporary station are not heated at public expense, and that the request of the officer could be granted. (72-315, J. A. G., Jan. 7, 1914.)

HEAT AND LIGHT: Furnishing in kind; exceeding regulation allowance.

It was shown by the report of a commanding officer at a recruit depot that a certain public building was only partly occupied as quarters for officers, it being occupied a part of the time by only one officer, and that in consequence of the size of the building and the means employed for heating it the total amount of the fuel allowance for the officers occupying said building was exceeded.

Held, that the regulations limiting the quantity of fuel allowed to officers for heating quarters occupied by them applies to cases where officers undertake to heat their own quarters, and not to cases where the burden of heating public quarters is undertaken by the Government; and that there was no legal objection to exceeding the fuel allowance of the officers occupying said building as quarters if the manner of heating the same was satisfactory to the Quartermaster Corps.

(72-310, J. A. G., Jan. 8, 1914.)

PUBLIC PARKS: District of Columbia; revocable license for buildings thereon; Potomac Park.

It was desired to know whether any legal authority existed for the granting of a revocable license to a branch of the Smithsonian Institution to occupy a portion of Potomac Park in the District of Columbia for an air-craft field laboratory, it being the purpose to construct thereon such small buildings of a temporary character as might be necessary.

The act of March 3, 1897 (29 Stat., 624), set aside the area formerly known as Potomac Flats, together with the Tidal Reservoir, as a

public park under the name of Potomac Park "to be forever held and used for a park for the recreation and pleasure of the people." The act of August 30, 1890 (26 Stat., 396), and of August 24, 1912 (37 Stat., 444), prohibits the erection of any building or structure upon the public parks of the District of Columbia without express authority of Congress.

Held, that there was no legal authority by which a revocable license for the purposes intended could be granted.

(80-800, J. A. G., Jan. 3, 1914.)

RED CROSS SOCIETY: Mileage to officer assigned to take charge of first-aid department.

The question arose as to whether the officer detailed to take charge of the first-aid department of the American Red Cross Society, pursuant to the act of March 3, 1911 (36 Stat., 1041), was entitled to mileage for travel performed in connection with his duties.

Held, that notwithstanding the close relations which the society sustains to the United States under existing law, it is not made a part of the Army, so that travel performed by the officer detailed to take charge of the first-aid department in connection with his duties becomes travel for the Army; and that it could not be certified that such travel was necessary in the military service as required by the act of March 3, 1883 (22 Stat., 456), in order to entitle an officer to mileage. The question was, therefore, answered in the negative.

(84-000, J. A. G., Jan. 13, 1914.)

TELEPHONE SERVICE: Telephones in private residences; room used for office.

The question arose as to whether a telephone might be installed in the private quarters of the attending surgeon at Philadelphia, Pa., in view of the provisions of section 7 of the act of August 23, 1912 (37 Stat., 414), which prohibits the expenditure of any money appropriated by Congress "for telephone service installed in any private residences or apartments or for toll or other charges for telephone service from private residences or apartments, except for long-distance tolls required strictly for the public business."

Held, that if the telephone in question is deemed necessary for the public business of the attending surgeon at Philadelphia, and if no other provision is made for such service, the law would not prohibit the payment for this service installed in a room of the officer's private quarters set apart for the transaction of his necessary public business as attending surgeon.

(72-335, J. A. G., Jan. 12, 1914.)

TRANSPORTATION: Travel allowance on discharge; transportation over different lines.

The depot quartermaster at San Francisco, Cal., desired instruction as to the manner of issuing transportation requests covering transportation of soldiers on discharge where they wished to travel

by some other line than that of shortest mileage to the point to which they are entitled to be transported, which point could be reached by other lines over longer mileage.

Held, that it is allowable to issue transportation requests over any of the lines out of San Francisco to any point desired, provided said point is not more distant than the one to which the soldier is entitled to transportation as measured by the shortest route, or the route which would be adopted for the interest of the Government if furnishing the transportation, if the cost thereof to the Government is not in excess of the cost over the route which would be adopted by the Government. *Held further*, that when the quartermaster has issued the transportation request and furnished subsistence the responsibility of the Government ceases, and it has no concern as to what the various railroad companies may do in honoring the request to other points so long as the request bears the certificate of the traveler that transportation has been furnished.

(94-332, J. A. G., Jan. 10, 1914.)

TRANSPORTATION: Of general prisoners on discharge from confinement; sentence of court-martial.

The act of March 2, 1913 (37 Stat., 715), appropriates:

"For transportation * * * of persons on their discharge from the United States military prison or from any place in which they have been held under a sentence of dishonorable discharge and confinement for more than six months, or from the Government Hospital for the Insane after transfer thereto from such prison or place, to their homes (or elsewhere as they may elect), provided the cost in each case shall not be greater than to the place of last enlistment."

Held, that this legislation should be construed as authorizing the transportation of a released general prisoner as in said act provided only when he shall have been confined for more than six months under a sentence of dishonorable discharge and confinement

(30-824.2, J. A. G., Jan. 21, 1914.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

CONTRACTS: Damages for failure to furnish hay according to contract.

A contract was entered into for delivery of a certain quantity of number one Kansas upland prairie hay at Fort D. A. Russell, Wyo., during the first quarter of the fiscal year 1911. The contract was approved June 9, 1910, but before that date two orders were given for hay apparently intended to come under the terms of the contract. The contractor did not deliver the hay as called for, and the Government purchased other hay of a different kind at Cheyenne, Wyo. The kind called for by the contract was not on sale at Cheyenne, but was sold at Denver. It does not appear that any attempt was made to purchase Kansas upland prairie hay of the quality called for by the contract, and it was not shown whether the kind purchased at a higher price was of a like or of a superior grade to that called for in the contract.

Held, that while it appeared that the contractor was in default under his contract it was incumbent upon the Government to show the damages which it sustained, which damages were limited to the difference in cost between the article called for in the contract and the cost of the same or practically the same article on the market, and could not be measured by the difference between the contract price and the cost of another article materially different selling in the market for a much higher price than the contract article. *Held further*, that the Government could not recover the difference of the cost from the contractor.

(Comp. Geo. E. Downey, Jan. 19, 1914.)

DAMAGES: Repairs of barge under verbal agreement; owner making repairs; appropriation.

The Government engaged a barge from a private company to supply it with coal at a certain lock on the Ohio River upon the express agreement that it was to be returned in as good condition as when received, but no written agreement was entered into. The barge was badly damaged in the course of bringing it through shallow water.

Held, that it was the right of the Government to have made the necessary repairs, but that as it waived this right and permitted the owner to do so, the latter should be regarded as the agent of the Government for the purpose of making such repairs and that the Government was liable for the reasonable cost of such repairs as were made necessary by any damage done to the barge while in said service. *Held further*, that the appropriation for the work in hand was available for the payment of said claim if otherwise correct.

(Comp. Geo. E. Downey, Dec. 15, 1913.)

EMPLOYEE: Paid from lump-sum appropriation; increase of efficiency.

Upon submission of certain questions by the Attorney General—

Held, that an increase in an employee's efficiency is not sufficient to warrant an increase in his salary payable from a lump-sum appropriation unless accompanied with a substantial change in the character of the service to be rendered.

Held further, that where the compensation paid from a lump-sum appropriation to the incumbent of a given position during a preceding fiscal year was less, because of inexperience or incapacity, than that paid in other like positions for the efficient performance of the same or similar services, a new employee appointed to the position who discharges its duties efficiently may be paid a rate of compensation which does not exceed the rate paid in other like positions for the same or similar services during the preceding fiscal year.

(Comp. Geo. E. Downey, Aug. 21, 1913, 20 Comp. Dec., 131.)

FORAGE: Mount not complying with regulations.

A major of Infantry claimed reimbursement for amounts expended by him for forage and straw and for shoeing his privately

owned mount, kept and used by him in the military service. The claim had been disallowed because it was held by the War Department that the animal was not a suitable mount. It appears that the horse was 2 inches below the height prescribed by Army Regulations.

Held, that in this case there was nothing to show that the officer was not mounted in a manner which enabled him to suitably perform his military duties, and reimbursement should be allowed.

(Comp. Geo. E. Downey, Jan. 30, 1913.)

GRATUITY: On death of soldier; designation of beneficiary by will.

A private soldier died in service from disease not the result of his own misconduct. The records of his company disclosed that he had designated a beneficiary for the six-months gratuity payable under the act of May 11, 1908 (35 Stat., 108), but failed to show the name of the beneficiary, and it did not appear that the soldier was survived by a widow. The last will of the soldier provided: "It is my desire that all my belongings, both deposits and otherwise, go to my mother," but did not give her name and address.

Held, that if upon investigation the designation slip could not be found or direct evidence as to the person designated could not be produced, the will should be taken as sufficient evidence that the person designated by him was his mother, and the six-months' gratuity might be paid to her.

(Comp. Geo. E. Downey, Jan. 3, 1914.)

HEAT AND LIGHT: Allowance to Navy officers on temporary duty.

Two Navy officers were ordered away from their permanent station to temporary duty at Newport, R. I.; one gave up his residence at his permanent station, and the other temporarily closed his house thereat.

Held, that the quarters which the officer's duty makes it necessary for him to occupy are those which the law contemplates shall be heated and lighted at Government expense, and if these officers gave up their residences at their permanent post or closed the same so that they would not be occupied during such period of temporary absence and so that no heat or light would be furnished by the Government for use therein, they would be entitled to heat and light allowances for quarters actually occupied by them at their posts of temporary duty.

(Asst. Comp. W. W. Warwick, Aug. 4, 1913, 20 Comp. Dec., 67.)

HEAT AND LIGHT: Allowance to Navy officers on leave; number of rooms.

During the month of June, 1913, a naval constructor was on duty at a shore station where he occupied quarters other than public, no public quarters being available for his use. He was on leave a portion of this time. He certified that during the month he occupied quarters at an inn, and that there were no means by which the quantity of heat and light consumed within the limits of his apartments could be definitely ascertained.

Held, that where an officer occupies quarters other than public the fuel or illuminating supplies for which can not be measured, he is entitled to not more than the allowances prescribed in the regulations for the number of rooms actually occupied; that the officer's certificate as to the number of rooms actually occupied by him, if sufficiently specific, will ordinarily be accepted by the accounting officers as sufficient evidence of that fact, but it is not conclusive, and in any case the accounting officers may require other evidence; that such certificate should show the number of rooms actually and exclusively occupied as his quarters and that the number does not include bath rooms, store rooms, or rooms used in common with other guests or tenants, such as public dining rooms, parlors, kitchens, halls, etc. *Held further*, that if the officer's quarters are actually occupied by his family or by persons dependent upon him for support during his absence with leave, payment for the heat and light allowance for such period was authorized; otherwise the officer was entitled to no heat and light allowance for such period.

(Asst. Comp. W. W. Warwick, Aug. 15, 1913, 20 Comp. Dec., 83.)

LIVING EXPENSES: Travel day; nights lodging.

In measuring a travel day for the purpose of computing daily expenses after review of certain decisions,

Held, that the daily charge for living expenses should commence with the charge for breakfast and end with the charge for lodging for the whole of the following night. The decision 19 Comp. Dec., 672, is modified accordingly.

(Comp. Geo. E. Downey, Jan. 7, 1914.)

MILEAGE: Cost of transportation under orders; hire of automobile.

An officer of the Army was ordered to travel on public business to a certain point and return. For a portion of the distance no railroad facilities were available and he was compelled to hire an automobile for this part of the journey. The mileage law of June 12, 1906 (34 Stat., 246), provides that officers of the Army traveling under competent orders without troops shall be paid 7 cents per mile and no more; that he may apply to the Quartermaster's Department of the Government for a transportation request for the journey, and if the same is furnished him it shall be charged against his mileage account at the rate of 3 cents per mile for whatever distance transportation is furnished.

Held, that said provisions were not repealed by the appropriation for transportation of the Army and its supplies (act of Mar. 2, 1913, 37 Stat., 716); "For the purchase, hire, operation, maintenance, and repair of such harness, wagons, carts, drays, and other vehicles as are required for the transportation of troops and supplies, and for official, military, and garrison purposes," and that the officer could not be reimbursed for the hire of the automobile.

(Comp. Geo. E. Downey, Dec. 16, 1913.)

MILEAGE: Naval service; Government furnishing transportation.

A chief warrant machinist of the Navy, whose rights to mileage are the same as those of an ensign, performed various journeys between Newport News, Va., and Norfolk, Va., under mileage conditions, using a Government conveyance. No directions for the allowance of actual and necessary expenses were given.

Held, that the fact that the officer was permitted to use a Government conveyance for the performance of this travel, the expense of which to the Government was inappreciable did not operate to defeat his rights to mileage, and mileage was therefore allowed for the travel at the rate of 8 cents a mile.

(Comp. Geo. E. Downey, Jan. 20, 1914.)

QUARTERS: Commutation of, at temporary station while family occupies quarters at permanent station.

An officer was ordered from his permanent station at Fort Snelling, Minn., where he and his family occupied public quarters, to temporary recruiting duty at Duluth, Minn. He requested that his family be allowed to occupy his quarters during his absence on this duty or until such time as might be necessary for him to ascertain the length of his detail or make further arrangements.

It is understood that this occupancy will not deprive other officers from obtaining these quarters when necessary. This request was approved by the commanding officer. He claimed commutation of quarters at his temporary station while on duty there.

Held, That the officer could not claim quarters or commutation thereof at more than one place at the same time; that his relinquishment of quarters at his former station must be absolute and unconditional to entitle him to claim allowance at his said temporary station; and that if the officer accepts or receives the benefits of Government quarters in kind, either directly for himself or indirectly for his family, he is not entitled to quarters or commutation thereof at any station during the period such benefit is accepted, even though such benefit be given through courtesy of the officer in charge. It was, therefore, held that the officer in question was not entitled to commutation of quarters while on temporary duty, overruling decision in 9 Comp. Dec., 379, in which his predecessor had overruled certain decisions of the Second Comptroller which rulings are now restored.

(Comp. Geo. E. Downey, Jan. 21, 1914.)

TRANSPORTATION: Furnishing means of, to an officer on a mileage status.

The mileage act of June 12, 1906 (34 Stat., 246), provides for the payment of mileage at the rate of 7 cents per mile and no more to officers traveling under competent orders without troops, and adds that—

“Officers who so desire may, upon application to the Quartermaster’s Department, be furnished under their orders transportation requests for the entire journey by land, exclusive of sleeping and parlor car accommodations, or by water; and the transportation

so furnished shall, if travel was performed under a mileage status, be a charge against the officer's mileage account to be deducted at the rate of 3 cents per mile by the paymaster paying the account."

Provision is also made in the Army appropriation act of March 2, 1913 (37 Stat., 716), for the purchase, hire, operation, maintenance, and repair among other things of wagons, harness, carts, and other vehicles as required for the transportation of troops and supplies and for official and military and garrison purposes.

Held, That the Army appropriation act had no reference to the mileage law and did not repeal or enlarge any of its provisions; that the mileage law goes no further than to authorize the issue of transportation requests over established lines of common carriers by land and water and that it does not authorize the hiring of an automobile for travel of an officer to a point inaccessible by common carriers.

(Comp. Geo. E. Downey, Jan. 12, 1914.)

TRAVEL ALLOWANCES: On discharge; soldier not furnished sleeping-car accommodations.

A soldier honorably discharged and entitled to travel allowances under the act of August 24, 1912 (37 Stat., 576), was furnished by the quartermaster with proper transportation from St. Paul, Minn., to Houston, Tex.; but although sleeping-car accommodations were demanded by the soldier, the same were not furnished by the quartermaster, and the soldier paid for them himself, to the amount of \$8.50, being the charge for a lower berth of a standard sleeper for said travel.

General Order No. 54, of December 18, 1912, War Department, provides that:

"When discharged soldiers elect to take transportation in kind and subsistence to place of enlistment, they will be entitled to the following:

* * * * *

"(b) * * * If tourist car not available, an upper berth in a standard sleeper may be furnished if practicable; if not, a lower berth. No sleeping-car accommodations will be furnished in any instance when a night's journey is not involved and the distance does not exceed eight hours' travel."

In this case it is certified that tourist-car accommodations were not available.

Held, that under present conditions of travel, when the journey involves night travel, it is recognized as a necessity by the Government to furnish to its employees sleeping-car accommodations in connection with transportation; that the soldier did not lose this right by accepting the transportation under protest and paying for the sleeping-car accommodations himself; and that he should be reimbursed in the amount which it would have cost to have provided an upper berth in a standard sleeper in accordance with said General Order No. 54.

(Comp. Geo. E. Downey, Oct. 7, 1913.)

DECISION OF THE COURT.

(Digest prepared in the office of the Judge Advocate General.)

ACCOUNTABILITY: For supplies received; certificate of accounting officers of the Treasury.

Suit was brought by the Government to recover from the defendant the value of certain Army supplies received by him officially as captain of a volunteer company in the Spanish War. It was alleged that he had failed to account for the same, and that the value thereof was charged to him on the certificate of the Quartermaster General of the Army. The defense was a denial of the indebtedness. In the suit the Government rested upon the certificate of the accounting officer of the Treasury Department to the effect that the balance sued for had been audited against the defendant.

Held, That the certificate of the appropriate auditor of the Treasury Department, properly authenticated in accordance with section 886, Revised Statutes, showing property unaccounted for by defendant, when introduced in evidence makes a *prima facie* case for the Government both as to the property and its value, properly charged at its cost to the Government, and the burden rests on the defendant to account for it or to prove any claimed deterioration in its value.

Held further, That in an action by the United States against an Army officer charged with failing to account for supplies in his custody, a claim that he turned such supplies over to the proper officer to receive them is one for a "credit," within the meaning of section 951, Revised Statutes, which provides that in such suits "no claim for a credit shall be admitted upon trial except such as appear to have been presented to the accounting officers of the Treasury for their examination," unless the failure to so present it is excused, etc., and where the defendant was repeatedly urged by such officers during three years to present any matter which would remove the charge appearing against him on the books, but failed to do so, evidence to establish such a defense is not competent.

(*United States v. Du Perow*, U. S. Dist. Ct., Oct. 15, 1913, 208 Fed., 895.)

BULLETIN 8.

BULLETIN }
No. 8. }

WAR DEPARTMENT,
WASHINGTON, *March 14, 1914.*

The following digest of opinions of the Judge Advocate General of the Army for the month of February, 1914, of a decision of the Comptroller of the Treasury, and of certain decisions of the Court of Claims, together with certain notes on the administration of military justice, is published for the information of the service in general.
[2094269 D—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ABSENCE: From duty, due to misconduct; stoppage of pay.

The Army appropriation act of August 24, 1912 (37 Stat., 572), provides that a soldier shall not receive pay from the appropriation contained in the act while he may be absent from duty on account of disease "resulting from his own intemperate use of drugs or alcoholic liquors, or other misconduct." A soldier attempted suicide by cutting his throat with a razor. Careful investigation showed that the act was committed because of acute melancholia, recurrent, existing prior to enlistment, the result of lack of success in civil life, and that there was no family, love, criminal, or vice troubles, and that the recruit was incapable of an appreciation of his act.

Held, that the case falls under the opinion of this office of February 14, 1913 (Bul. No. 8, W. D., Mar. 18, 1913, p. 3), "that the words 'other misconduct' in the statute are limited by the rule of *ejusdem generis* to conduct of the same general character as that indicated by the words preceding them, to wit, 'intemperate use of drugs or alcoholic liquors,' or misconduct consisting in the intemperate or improper indulgence of natural or acquired appetites;" and that the pay of the soldier during his temporary disability should not be withheld.

(72-210, J. A. G., Feb. 18, 1914.)

APPROPRIATIONS—LUMP-SUM: Promotion of employees paid from; change of duties.

A chief clerk whose salary was paid from a lump-sum appropriation had been given, during the current fiscal year, increased re-

sponsibilities, and had been called upon to perform certain duties in addition to and different from those performed by him during the preceding fiscal year. The question submitted was whether, in view of his increased responsibilities and duties, an increase of his salary would be in violation of section 4 of the legislative, executive, and judicial appropriation act of March 4, 1913 (37 Stat., 790), which amends section 7 of the act of August 26, 1912 (37 Stat., 626), to read *inter alia* as follows:

"That no part of any money contained herein or hereafter appropriated in lump sum shall be available for the payment of personal services at a rate of compensation in excess of that paid for the same or similar services during the preceding fiscal year; * * *"

Held, that as the increase in the number and change in the character of the duties of said employee had occurred since June 30, 1913, and as certain of these increased duties which he performed and would continue to perform had been superimposed on his other duties and were of a different character, the question as to whether these additional duties were of such a different character or were sufficiently important to justify an increase in compensation was one of administration, and that if it be decided, as an administrative question, that the change in the character of the duties of said employee was such as to make his position substantially a new one and different from any held during the preceding fiscal year, so that it could not be said that he would be paid more than he was paid during the preceding fiscal year for the same or similar services, the proposed increase in his compensation might lawfully be allowed.

(80-460, J. A. G., Feb. 28, 1914.)

APPROPRIATIONS: Transfer and promotion of clerk from statutory to lump-sum.

The question submitted was whether in view of the prohibition contained in section 4 of the act of March 4, 1913 (37 Stat., 790), amending section 7 of the act of August 26, 1912 (37 Stat., 626), a clerk occupying a statutory position in the office of the Chief Signal Officer at \$1,200 per annum whose duties were those of "stenographer and typewriter and assistant to the clerk in charge of personnel records" could be transferred to the position of "principal clerk in the aeronautical division" upon a lump-sum pay roll, the latter position having been established by the Secretary of War June 27, 1908, and having been in existence since that date. The legislation referred to provides:

"That no part of any money contained herein or hereafter appropriated in lump sum shall be available for the payment of personal services at a rate of compensation in excess of that paid for the same or similar service during the preceding fiscal year; nor shall any person employed at a specific salary be hereafter transferred and hereafter paid from a lump-sum appropriation a rate of compensation greater than such specific salary * * *"

Held, that said transfer and promotion would be permissible under the law, provided that the duties of the new position were essentially different from those of the employee's former position.

(5-075, J. A. G., Feb. 10, 1914.)

CHAPLAINS: Does service on the retired list constitute service for promotion?

The question submitted was whether service on the retired list constitutes service within the meaning of the act of Congress concerning the rank of chaplains approved April 21, 1904 (33 Stat., 226), which act provides under certain conditions for the promotion of chaplains to the "grade, pay, and allowances of major."

Held, that service on the retired list did not constitute "service" within the meaning of that term as used in said act.

(6-229.3, J. A. G., Feb. 3, 1914.)

COMPTROLLER OF THE TREASURY: Submission to, by the department, of voucher of disbursing officer for advance decision.

A district engineer officer suspended, on June 30, 1913, an assistant engineer, pending the outcome of charges which he preferred against him for inefficiency. Upon investigation, the Secretary of War failed to sustain the charges, and the officer was so advised by the Chief of Engineers, and also that the assistant engineer should be restored to duty and paid his authorized salary from the date of his suspension until his restoration to duty. The officer, before making payment, forwarded through the Chief of Engineers a voucher for the amount of salary due said assistant engineer for the period named, with the request that it be submitted to the comptroller for an advance decision. The Chief of Engineers forwarded the same with favorable recommendation.

The question was raised as to "whether there was occasion for the department to submit this case to the Comptroller of the Treasury."

Held, that the circumstances of the case clearly brought it within the decision of the Comptroller of May 7, 1906 (12 Comp., Dec., 653), wherein it was held that where a subordinate "suspends a civilian employee from duty without pay *when he is able and willing to perform his duties*, and prefers charges against him, and the Secretary of War subsequently declines to sustain the charges and decides that his suspension was not justified, said employee is entitled to pay during the period of his suspension," and also within the decisions of the Court of Claims in the case of *Stilling v. United States* (41 C. Cls., 61), and the Supreme Court of the United States in the case of *United States v. Wickersham* (201 U. S., 390), both of which were to the same effect as the above decision of the Comptroller; that, therefore, there would appear to be no good reason why the department should submit the question of the payment of this voucher to the Comptroller, but that the disbursing officer had the right under the law to submit the voucher to the Comptroller before paying the same, if he was doubtful as to the legality of the proposed payment.

(16-211, J. A. G., Feb. 27, 1914.)

CONTRACTS: Agency; final payment on a contract to person holding power of attorney.

The contractor for the extension of the water distributing system at West Point, N. Y., being without funds, in consideration of an

agreement by a third party to secure for him the necessary contract bond, finance the project, pay him a weekly salary for supervision, and allow him a certain per cent of all balances in excess of expenses at the close of the work, executed a power of attorney in favor of said party. Prior to final payment for the work, which resulted in loss, the contractor disappeared. The work had been completed and accepted, the extension had been in actual operation, and the party holding the power of attorney requested that he be paid the balance due under the contract.

Held, in view of the provisions of sections 3737 and 3744, Revised Statutes, which, respectively, prohibit the assignment of contracts to which the United States is a party, and require all contracts entered into on behalf of the United States by the War, Navy, and Interior Departments to be reduced to writing and signed at the end thereof by the contracting parties, it could not be shown that the person in whose name the contract was made was in fact the agent of another, so as to authorize payment to the latter (10 Comp., Dec., 201), and that payment could not properly be made to the applicant as principal of the person with whom the contract was made.

(76-520, J. A. G., Feb. 11, 1914.)

COURTS-MARTIAL: Effect upon proceedings when officer who preferred the charge sits as a member of the trial court.

In each of three cases tried by a special court-martial the record showed that the officer who had signed the charge sat as a member of the court and participated in the findings and sentence. Information from a source outside of the record indicated that the officer who had signed the charge in each case had been directed by superior military authority to prefer the charge, and that the action of said officer in connection with the preferring of the charge was that of a mere ministerial agent carrying out instructions from superior authority. The question raised was whether or not, under these conditions, the officer who had signed the charges was legally eligible to sit as a member of the court for the trial of these cases, and whether or not his sitting as a member of the court served to invalidate the proceedings, in view of the provision in the act of March 2, 1913 (37 Stat., 722), that—

"The commanding officer of a * * * camp * * * may appoint special courts-martial for his command; * * * and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution."

Held, that the officer who has signed the charge in a particular case is *prima facie* the accuser in that case; that in signing the charge he has performed an act that, in the absence of a showing to the contrary, must be construed as having been performed in the capacity of an accuser; that *prima facie* he is therefore ineligible to sit as a member of the trial court; that if, when the charge is laid before the court, a showing be made to the satisfaction of the court that the preferring of the charge by the officer signing the same was an act purely ministerial in character, performed in pursuance of orders from superior authority and representing no initiative or conviction on the part of the officer so signing, the court may find

that the officer is not in fact the accuser within the meaning of the statute, and therefore not disqualified under the statute from sitting as a member of the court for the trial of the case; that in such a case the fact that evidence touching the eligibility of the officer was heard by the court, and the finding arrived at by the court, should be made of record; that after the proceedings have been concluded, and the record has been made up, evidence *aliunde* can not be considered for the purpose of rebutting the presumption that the officer who signed the charge is in fact the accuser in the case; that since in each of the cases in reference the record showed that the officer preferring the charge sat as a member of the trial court, and contained nothing to indicate that said court, upon investigation, had arrived at a finding that he was not as a matter of fact the accuser in the case, it must be held that he was legally ineligible to sit as a member of the court for the trial of said cases, and that the proceedings in each of said cases must be held to be invalid.

(30-435, J. A. G., Feb. 20, 1914.)

COURTS-MARTIAL: Effect upon proceedings when officer who preferred the charge sits as a member of the court; subsequent proceedings upon same charge.

A soldier was brought before a general court-martial at Jackson Barracks, La., for trial upon the charge of fraudulent enlistment. He entered a plea of guilty, was found guilty, and was sentenced accordingly. The record of the proceedings showed that the officer who preferred the charge sat as a member of the court when the case came up for trial. The reviewing authority disapproved the proceedings, findings, and sentence, for the reason that—

"The officer preferring the charges was permitted to sit as a member of the court, in violation of the act of March 2, 1913," which provides (37 Stat., 722) that—

"* * * the commanding officer of a territorial * * * department * * * may appoint general courts-martial whenever necessary; * * * and no officer shall be eligible to sit as a member of such court when he is the accuser, or a witness for the prosecution."

Subsequently, at Fort Morgan, Ala., the soldier was brought before a general court-martial for trial upon substantially the same charge, whereupon he pleaded former jeopardy and the one hundred and second Article of War in bar of trial. The court sustained the plea of former jeopardy, and, the record of the proceedings having been returned to the convening authority, the latter requested an opinion as to the validity of the plea interposed by the accused and sustained by the court.

Held, that the question to be determined was whether or not the proceedings at Jackson Barracks were had before a lawful court and therefore constituted a lawful trial, in view of the fact that the officer preferring the charge sat as a member of the court for the trial of the case; that the evident intent embodied in the legislation of March 2, 1913, is to disqualify for service as a member of the trial court any officer who has placed himself in the attitude of accusing the person to be tried of the offense for which he is to be tried;

that the officer who has signed the charge in a particular case is *prima facie* the accuser in that case and *prima facie* ineligible to sit as a member of the trial court; that in the absence of a showing that the officer who signed the charge is not in fact the accuser in the case, and of a finding and ruling to that effect made of record in the case, the fact that the officer whose name is signed to the charge sat as a member of the court must be regarded as invalidating the proceedings; that if the record in the case shows that the officer who signed the charge sat as a member of the trial court and there is nothing in the record to disturb the presumption that he is in fact the accuser, the record must be construed as showing that the accuser, within the meaning of the act of March 2, 1913, sat as a member of the court, and the proceedings must be held invalid; that inasmuch as the record of the proceedings at Jackson Barracks showed that an officer who sat as a member of the court had signed the charge before that court for trial and was therefore *prima facie* the accuser in the case, and as there was no showing and finding of record that he was not in fact the accuser, the court at Jackson Barracks was not lawfully constituted for the trial of that case, and its proceedings were therefore null and void; that the action of the reviewing authority upon the proceedings had at Jackson Barracks was in legal effect a declaration of nullity, and, being warranted in law, is binding upon the court at Fort Morgan, to which the pending charge against the accused was referred for trial; that not having been legally tried heretofore upon the charge now brought against him the accused may be required to answer to said charge; and that the convening authority may reverse the ruling of the trial court in respect of the plea of former jeopardy and remand the case to the trial court for further proceedings.

(30-453.21, J. A. G., Feb. 28, 1914.)

HEAT AND LIGHT: Issue of allowance of, to servant of officer absent on temporary duty.

The question was submitted as to whether a servant left in charge of an officer's quarters during his absence on temporary duty could be considered as a part of the officer's family so that the officer's fuel and light allowance could be issued to said servant.

Held, that the term "family" is one which may have a well-defined and restricted or a broad and comprehensive meaning according to the connection in which it is used, but that unless the context manifests a different intention the word "family" is usually construed in its primary sense as signifying "the collective body of persons living in one house, or under one head or manager, or one domestic government" (19 Cyc., 450-453); and that in the case under consideration, as the quarters were occupied only by a paid caretaker who had been a servant in the officer's family, the occupancy by such caretaker could not be considered as an occupancy by the officer's family, the occupancy contemplated by the regulations being an actual and not a constructive occupancy. *Held further*, that such paid caretaker could not be regarded as coming under the term "family" as used in paragraph 1039, Army Regulations, 1913, which provides that:

"Fuel will only be issued or sold to an officer upon his certificate that it is for his personal or family use; * * *."

(72-315, J. A. G., Feb. 19, 1914.)

HEAT AND LIGHT: Officer on temporary duty, to whom fuel and light were issued, not entitled to draw fuel and light at his permanent station for the same period, even though his total allowance be not exceeded.

An officer on temporary duty at Galveston, Tex., occupied a house at his temporary station from July 1 to December 31, 1913, for which he drew fuel from the depot quartermaster at Galveston. During the same period a paid servant occupied the officer's quarters at Fort Riley, Kans., his permanent station, as a caretaker, and was supplied with fuel and light therefor by the quartermaster at Fort Riley. The question submitted was whether the officer should be required to pay for the fuel and light furnished at Fort Riley, provided his total allowance of fuel from July 1, 1913, to June 30, 1914, was not exceeded.

Held, that the issue of fuel at Fort Riley for any part of the period from July 1, 1913, to December 31, 1913, was unauthorized, under the decision of the Assistant Comptroller dated February 8, 1912 (18 Comp. Dec., 592), in which it was held:

"When the quarters actually occupied by an Army officer are heated at the expense of the United States he is not entitled to have any additional fuel issued to himself or to his family at the expense of the United States, notwithstanding the fact that he may not have occupied the full number of rooms to which his rank entitled him or that the quantity of fuel used to heat the rooms which he occupied as quarters may have been less than the quantity which the regulations prescribed as the maximum quantity for the number of rooms which he occupied."

(72-315, J. A. G., Feb. 24, 1914.)

PATENT RIGHTS: Repairs to engine protected by.

An engine in a Government power plant protected by certain patent rights had been wrecked and the question was raised in connection with repairing the same as to whether there was any legal reason why the contract for repairs thereto should not be awarded to the lowest bidder, said lowest bidder being neither the owner of said patent rights nor possessing any interest therein.

Held, that it is well settled that the purchaser of a patented machine has the right to use it until it is worn out and may repair it or replace worn-out parts, provided he does not infringe some other patent in so doing; and that, therefore, there could be no question of the right of the Government to have the engine in question repaired by any contractor to whom it might elect to award the work.

(76-125, J. A. G., Feb. 5, 1914.)

RESTORATION TO DUTY: Of general prisoner serving sentence of confinement at the United States Military Prison, Fort Leavenworth, Kans.

A general prisoner who had theretofore been dishonorably discharged the service of the United States and was serving a sentence of confinement at the United States Military Prison, Fort Leavenworth, Kans., pursuant to the sentence of a general court-martial, applied for restoration to duty to complete the enlistment from which he had been dishonorably discharged pursuant to such sentence.

Section 1352 of the Revised Statutes, relating to the United States Military Prison and persons confined therein, reads as follows:

"The commandant shall take note and make record of the good conduct of the convicts, and shall shorten the daily time of hard labor for those who, by their obedience, honesty, industry, or general good conduct, earn such favors; and the Secretary of War is authorized and directed to remit, in part, the sentences of such convicts, and to give them an honorable restoration to duty in case the same is merited."

Held, that under the foregoing statute the Secretary of War had the power to give said general prisoner an honorable restoration to duty, and that he should do so in case it was merited; and that such honorable restoration did not mean a new enlistment, but did mean a revival of the old enlistment and the reinstatement of the delinquent in it at the point where he quitted it in dishonor.

(80-462, J. A. G., Feb. 25, 1914.)

TRANSPORTATION: Excess baggage; can an officer who has been furnished with transportation of excess baggage be legally required to remit the cost of the same?

An officer was ordered to proceed on duty without troops from Fort Douglas, Utah, to Washington, D. C. Upon his application transportation of three hundred pounds of excess baggage in connection with said travel was furnished him by the depot quartermaster at St. Louis, Mo., from Kansas City, Mo., to destination. In view of the decisions of the Comptroller of the Treasury, construing the laws authorizing payment of mileage and the transportation of baggage of officers traveling on a mileage status, that they must bear the expense of the transportation of their excess baggage from their mileage allowance in like manner as they pay therefrom the cost of their transportation and of their parlor and sleeping car fares, and that any payment of the same from public funds would be unlawful, said depot quartermaster requested the officer to remit to him the cost of the transportation of his excess baggage in order that he might make settlement with the carrier therefor. This he refused to do until so ordered by direction of the Secretary of War. He thereupon transmitted the amount through The Adjutant General of the Army, with the request that before the same should be forwarded to said depot quartermaster an opinion be obtained from the Judge Advocate General as to whether he could legally be ordered to remit this money in the manner indicated, as he was unable to find any law, decision, or regulation in accordance with which an officer could be ordered to remit money under such circumstances.

Held, that as the shipment was made by the quartermaster upon the officer's application, and as under the law as construed by the Comptroller payment therefor can not lawfully be made from any Government appropriation but is a charge against the officers' mileage allowance, the quartermaster must be held to have acted as the agent of the officer and not of the Government in furnishing the transportation, and therefore the order for the remittance of the cost of the shipment was properly and lawfully issued.

(94-232.1, J. A. G., Feb. 20, 1914.)

DECISION OF THE COMPTROLLER OF THE TREASURY.

(Digest prepared in the Office of the Judge Advocate General.)

TRANSPORTATION: Of excess baggage with change of station allowance; cost of, not subject to land-grant deductions.

A railroad company appealed from a disallowance by the Auditor for the War Department of its claim for transportation of excess baggage of certain officers shipped by quartermasters with their change of station allowances, said claim for additional compensation being on account of land-grant deductions made by disbursing officers in paying for the transportation of such excess baggage. The railroad company contended that it was entitled to payment for the transportation of such excess baggage at full tariff rates without land-grant deductions. The Comptroller, while affirming the disallowance by the Auditor on the ground that the appropriations for "Transportation of the Army and its supplies" are not available to make any payments for transportation over the land-grant roads specified in said acts in excess of 50 per cent of tariff rates and holding that any claims of this character should be made directly upon the officers who were furnished with the transportation, overruled his prior decisions of December 20, 1910 (17 Comp. Dec., 428), and of June 26, 1911 (17 Comp. Dec., 997), which authorized land-grant deductions from the transportation of such excess baggage and reimbursement by the officers to whom the transportation was furnished on the basis of the net rates thus determined.

In overruling said former decisions upon the application of the land-grant laws to the transportation of excess baggage, *held*, that any excess baggage over the change of station allowance authorized by Army Regulations can in no sense be held to be Government property or property which the Government is pledged to transport, and a railroad company can not be required to transport it as public property; that the provisions in the appropriation acts that payments to land-grant railroads shall not be in excess of 50 per cent of the tariff rates applies only to moneys authorized to be expended therefrom and payable by the Government for service rendered to the Government and not to the transportation of an officer's baggage, for which the law requires that reimbursement shall be made by him; and that, therefore, the excess over the regulation change of station allowance of baggage of an officer of the Army authorized to be shipped with such allowance is not subject to land-grant deductions, but should be paid for and reimbursement collected at the tariff rates applicable on said excess for the shipment as made.

(Comp. Geo. E. Downey, Feb. 21, 1914.)

DECISIONS OF THE COURT OF CLAIMS.

(Digests prepared in the office of the Judge Advocate General.)

ARMY REGULATIONS: Changes in. Board, lodging, etc., of civilian employees on temporary duty.

A clerk in the Subsistence Department, Fort Riley, Kans., was ordered on temporary duty at San Antonio, Tex., where he served from March 9 to July 20, 1911. On March 28, 1911, the Secretary of War approved the recommendation of the Quartermaster General

that thereafter the allowance under Army Regulations of not to exceed \$4.50 per day for board, lodging, etc., to all civilian employees of the War Department assigned to temporary duty and paid from the appropriations for the Quartermaster's Department, be limited to the first 30 days on such duty. Said clerk was accordingly paid the cost of his meals, lodgings, etc., for the first 30 days only. He filed a claim for reimbursement under Army Regulations for the balance of the time he was on temporary duty, contending that the Secretary of War acted beyond the scope of his legal authority in attempting to change the Army Regulations prescribing said allowances of civilian employees, on the ground that the issuing or modifying such regulations must be distinctively the personal act or order of the President, which could not be delegated to a subordinate.

Held, that it is well settled by both the decisions of the Court of Claims and the Supreme Court that the President may legally act through the head of a department, that the fixing of 30 days as the limit of temporary duty in this case was wholly within the discretion of the Secretary of War, and that the plaintiff had no legal claim against the United States for reimbursement for the cost of his board and lodgings for any time in excess thereof.

(*Maxwell v. United States*, C. Cls. No. 31246, Feb. 9, 1914.)

PAYMASTERS' CLERKS OF THE NAVY: Officers within the meaning of the mileage laws.

A paymaster's clerk of the Navy was ordered to proceed from Washington, D. C., to his home and to consider his appointment revoked upon his arrival thereat. He was reimbursed for his traveling expenses on said journey. He filed a claim for the difference between his traveling expenses and mileage at 8 cents per mile, contending that he was an officer of the Navy, and as such was entitled to mileage instead of traveling expenses when traveling under orders.

Held, that as the Naval Regulations require that a paymaster's clerk shall be appointed by the Secretary of the Navy, he is an officer of the Navy within the meaning of the decision of the Supreme Court in the case of the *United States v. Mouat* (124 U. S., 303), wherein it was held that an appointment by the head of a department constitutes the person appointed an officer of the United States, and that being an officer of the Navy he is entitled to the benefit of the mileage laws.

(*Katzer v. United States*, C. Cls. No. 31888, Feb. 9, 1914.)

NOTES ON THE ADMINISTRATION OF MILITARY JUSTICE.

1. On February 14, 1914, the Secretary of War had the following instructions communicated to each officer exercising general court-martial jurisdiction:

(a) "In each case tried by general court-martial in which a penitentiary is designated as the place of confinement of the person tried, the record of trial, when forwarded to the Judge Advocate General of the Army, will be accompanied by a signed statement indicating the law or laws authorizing the confinement in a penitentiary of the person sentenced.

(b) "In each case tried by general court-martial in which the confinement of the offender in a penitentiary is authorized by law, but in which a place other than a penitentiary is designated as the place of confinement, the record of trial, when forwarded to the Judge Advocate General of the Army, will be accompanied by a signed statement indicating the law authorizing the confinement in a penitentiary of the person sentenced and the reasons, briefly expressed, for designating a place other than a penitentiary, instead of a penitentiary, as the place of confinement in the particular case.

(c) "If the law relied upon as authorizing confinement in a penitentiary be a Federal statute an accurate citation will be regarded as sufficient to indicate the law, but if any other law be relied upon as authorizing confinement in a penitentiary such law will be quoted in full in the required statement."

2. In connection with the designation of places of confinement a department commander was advised that the demand for prison labor at posts was not deemed a sufficient reason by the War Department to warrant a departure from the rule laid down in paragraph 15, General Orders No. 56, War Department, 1913, and reiterated in special instructions of December 4, 1913, in a case in which the offender was legally and properly punishable by confinement in a penitentiary. It was further stated that the success of the effort now being made to reclaim offenders convicted of purely military offenses, and the feasibility of extending the scope of that effort to include offenders convicted of civil offenses not punishable by confinement in a penitentiary, must depend to a considerable extent upon the cooperation of officers exercising general court-martial jurisdiction, and the care employed by them in furthering the plans of the War Department to exclude from the military prisons all offenders hereafter convicted by general court-martial of offenses legally and properly punishable by confinement in a penitentiary.

3. In two cases, based on charges alleging the commission of felonies, the introduction by the prosecution of hearsay testimony was permitted, perhaps in the belief that, because the testimony consisted of statements made to an officer who was at the time conducting an official investigation, it formed an exception to the hearsay rule, which, however, is not the case. While there was other evidence which, though meager, might have been considered sufficient if the court had arrived at its findings from a consideration of this alone, the fact that hearsay testimony might have been the controlling factor for the court's conclusions, or that the direct evidence might not have been considered sufficient proof without the hearsay, induced this office to recommend the remission of the unexecuted portions of the sentences in these cases. The fact that counsel for the accused failed to object to the admission of the testimony was not considered a sufficient reason to refrain from this recommendation. The admission of incompetent testimony always embarrasses the administration of justice and subjects it to criticism. It was further observed in these cases that the reviewing authority did not remark upon the improper admission of hearsay testimony.

4. It has been frequently observed that judge advocates of courts fail to comply with the provision of the Manual of Courts-Martial,

page 27, note 2, requiring a certificate as to disposition of the carbon copy of the record; and on the printed form, when used, it often occurs that the answer to the question "Has copy been furnished accused or sent to Judge Advocate General?" is *yes*, which answer does not indicate which of the two dispositions was made of the carbon copy. When this office is called upon to furnish a copy, as provided in the One hundred and fourteenth Article of War, to the party tried or his proper representative, the record under such circumstances does not show affirmatively whether the accused has been already furnished a copy, and it therefore devolves upon the department to furnish another, sometimes at considerable expense and cost of labor. Department headquarters should note these failures to make a proper entry and have them corrected before forwarding the proceedings to the office of the Judge Advocate General.

5. A department commander has forwarded the following observation of one of his officers as worthy of consideration, and it is deemed important that the practice to which he adverts be corrected:

(a) "Attention is called to the fact that numerous charges against enlisted men for desertion, or cases involving desertion, referred to the judge advocate for trial by general court-martial, are accompanied by nothing more enlightening than a statement in effect: '----- can testify that the accused did desert the service on ----- date.' Or, 'I will testify that the records show that the accused deserted the service at ----- on ----- date.'

(b) "Such very condensed, or incomplete, synopses of testimony expected are of very little use to the judge advocate in preparation of his case, and it is especially difficult where the charges originate and the witnesses are at places other than place of trial, and also in cases to be tried by deposition, which cases require considerable correspondence before the judge advocate can prepare intelligent interrogatories and not burden the record with hypothetical and 'stock' questions."

BULLETIN 14.

BULLETIN }
No. 14. }

WAR DEPARTMENT,
WASHINGTON, April 14, 1914.

The following digest of opinions of the Judge Advocate General of the Army for the month of March, 1914, and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2094269 E—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

CIVILIAN EMPLOYEES: Medical treatment in hospital after discharge from service; reimbursement for subsistence.

A former civilian teamster, while in the service of the Quartermaster Department at Fort St. Michael, Alaska, was severely injured and taken to the post hospital for treatment. Before he left the hospital he had been discharged from the service, and was destitute and unable to pay his hospital expenses when he left the hospital.

Held, that from the regulations and the conditions affecting the man's service as appeared from the papers in the case, he was entitled to medical treatment at Government expense for his injury, and that this right continued for a reasonable time for such treatment, notwithstanding his relations with the Government as an employee had ceased, but that this right did not include treatment for chronic ailments or for an injury after it had become evident that the same was incurable or that the patient's condition could not be improved by further treatment. *Held further*, that it was proper to issue rations at the expense of the appropriation for the subsistence of the Army to reimburse the hospital fund for the subsistence of the patient.

(16-414, J. A. G., Mar. 28, 1914.)

CONTRACTS: For supplies; receiving bid after time for opening; excuses for delay.

Bids were received for 6,000 trunk lockers at the Philadelphia, Pa., depot February 25, 1914. The circulars to bidders specified that the bids would be opened at 11 a. m. on that day, and that proposals re-

ceived thereafter would not be considered. Just prior to the time for opening the bids a telephone message was received requesting that the opening be delayed until the sender could arrive with his proposal, stating that his car had broken down. The request was complied with and bids were not opened until 11.20 a. m. The delayed bid was found to be the lowest.

Held, that while it would be legal to waive the irregularity and admit the bid, yet such action was not recommended, in view of the terms of the circular to bidders and the provisions of paragraph 539, Army Regulations, 1913, which, after various precedents had been established for waiving delays in the reception of bids where the bidder was not considered at fault, was amended so as to recognize but one ground for such delay—that is, where it is clearly shown that the nonarrival on time was due solely to delay in the mails, for which the bidder was not responsible.

(76-251, J. A. G., Mar. 7, 1914.)

CONTRACTS: Supplemental; filing copies in Returns Office; paragraph 563, Army Regulations, 1913.

Section 3744 of the Revised Statutes makes it the duty of the Secretary of War, *inter alia*, to require contracts made under his authority "to be reduced to writing, and signed by the contracting parties with their names at the end thereof," and also requires that copies of such contracts be filed in the Returns Office of the Interior Department.

Held, that where a supplemental contract is made with the same formalities as are required for the execution of the original contract, such supplemental contract is in effect a new one modifying the prior contract, and a copy thereof should be filed in the Returns Office of the Interior Department as required by said section 3744 and also by paragraph 563, Army Regulations, 1913.

(76-340, J. A. G., Mar. 31, 1914.)

DESERTERS: Expense of returning to their proper station; commutation of subsistence of guard.

Two deserters surrendered themselves to the military authorities at Tacoma, Wash., and were returned in charge of a sergeant to their proper station at the Presidio, San Francisco, Cal. The sergeant was paid the commutation value of rations for himself and the men.

Held, That the expense of transporting a deserter to his proper station, or to his place of trial and which should be charged against him, includes not only the cost of transportation proper but also the subsistence both of himself and of his guard (Dig. Op. J. A. G., 1912, p. 407 a), but that the charge on account of subsistence of the guard should be limited to the amount by which the subsistence or commutation of subsistence furnished him exceeds the cost of his subsistence at his proper station.

(26-423.1, J. A. G., Mar. 26, 1914.)

EIGHT-HOUR LAW: In the District of Columbia; female employees of the telegraph office, War Department.

The act of February 24, 1914 (Public, No. 60) provides—

“That no female shall be employed in any manufacturing, mechanical or mercantile establishment, laundry, hotel, or restaurant, or telegraph or telephone establishment or office or by an express or transportation company in the District of Columbia more than eight hours in any one day or more than six days or more than forty-eight hours in any one week.”

Held, that the sovereign authority of a country is not bound by the words of a statute unless named therein (36 Cyc., 1172); that the United States was, therefore, not included within the meaning of the law and the telegraph office located in the War Department was not a telegraph establishment intended to be covered by the act; and that female employees on duty therein did not come within the statute.

(32-420, J. A. G., Mar. 14, 1914.)

MILITIA: Organized, of the District of Columbia; naval battalion; retirement in the next higher grade.

Section 20 of the act of February 18, 1909 (35 Stat., 631) for the organization of the Militia of the District of Columbia, provides for the retirement of officers of the National Guard of said district upon their own application, and further that—

“An officer so retired who at the time of making such application has remained in the same grade for the continuous period of 10 years * * * may be retired with increased rank of one grade and shall, before being so retired, receive from the President of the United States the commission of the new grade * * *.”

An officer of the naval battalion was commissioned ensign March 13, 1903, promoted to lieutenant, junior grade, February 25, 1904, promoted to lieutenant February 12, 1906, and transferred to the ordnance department as first lieutenant with rank from December 23, 1909. He claimed to have served in one grade since February 25, 1904.

Held, that this officer counting back 10 years from the date of his application for retirement had served 10 years in the grades of lieutenant, junior grade, and lieutenant; that these grades were distinct in the regular naval service, and had distinct assimilated grades in the Military Establishment; and that the applicant was not eligible for retirement in the next higher grade of captain, not having served continuously for 10 years in the grade of lieutenant prior to his application.

(58-820, J. A. G., Mar. 14, 1914.)

NAVIGABLE WATERS: Harbor and high-water lines; lands below high-water line.

In connection with the construction of Dam No. 1 on the Mississippi River at Minneapolis, Minn., opinion was asked as to the liability of the United States to pay for the flowage of certain lands lying streamward from established harbor lines, or from the natural

high-water line. It appeared that by the construction of this dam the water level would be raised so as to overflow some hard and fast land owned by private parties lying above the high-water line, and to submerge to a greater extent other lands below said line already wholly or partially submerged. The dam was a navigation improvement undertaken by the Federal Government and authorized by the act of March 3, 1899 (30 Stat., 1147), as modified by the act of June 25, 1910 (36 Stat., 729).

Held, that a harbor line established pursuant to law is simply a line of convenience for the regulation of the exercise of private rights, is in the nature of a general permit for the erection of structures in aid of commerce, and is not a line vesting any rights in individuals; that if during the progress of a public navigation improvement, and in consequence thereof, land lying below the high-water line becomes more deeply submerged than before, the United States does not thereby become liable for a violation of the rights of private property; and that this is so regardless of an established harbor line; but that the rule does not apply to lands above the high-water line.

(62-851, J. A. G., Mar. 11, 1914.)

NAVIGABLE WATERS: Title to submerged lands under; easement in favor of works of national defense.

1. Certain cables pertaining to the fire control of the defenses protecting the eastern entrance to New York Harbor were laid for a distance over certain lands beneath the navigable waters of the river at that point, which lands had been leased by the State of New York to private parties for oyster culture purposes. It seemed to be conceded that, upon the one hand, it would be dangerous to the operators using dredges in the vicinity of these cables, and injurious to or destructive of the harbor-defense system upon the other. Consequently, it was alleged, the lessees, to their loss, had abandoned operations in the immediate vicinity of the cables. The question was submitted by the proper military authorities whether the cables and their accessories must be transferred from their present location in order that oyster dredging in that particular locality might not be interfered with, it being accepted without question that dredging should not be carried on within the immediate vicinity of the cables. Upon the fundamental question whether the constitutional rights and duty of the Federal Government to provide for the common defense gave to that Government such paramount rights for that purpose over the submerged areas in question as to subject such areas, regardless of any private property rights in them, to such use.

Held, in the affirmative, that the title to the submerged lands beneath the navigable waters in question is qualified by its subordination to such use of them by the Federal Government as may be demanded by the Federal Government in the exercise of its duty to provide for the common defense, and that in that case any loss suffered by the State's lessees by reason of such cables or such coast-defense system was not such as required compensation by the United States.

2. Inasmuch as Congress had actually subjected the lands and water in question to said use for the purpose of national defense by instituting said harbor-defense system and maintaining it out of public moneys appropriated for the purpose, and had provided for the protection of such systems by a penal statute providing that—

“Whoever shall willfully trespass upon, injure, or destroy any of the works or property or material of any submarine mine or torpedo, or fortification or harbor-defense system owned or constructed or in process of construction by the United States, or shall willfully interfere with the operation or use of any such submarine mine, torpedo, fortification, or harbor-defense system, * * *.” (Sec. 44, Penal Code.), should be punished with fine and imprisonment. *Advised*, that where oyster-dredging operations are carried on in the immediate vicinity of harbor-defense cables or any other aids to national defense protected by the above quoted statute and are so conducted as to trespass upon, injure, or destroy any of such works of defense, it would be the duty of the department to see that proceedings were instituted under that statute to punish the parties for the offense so committed.

(62-113, J. A. G., Mar. 19, 1914.)

NEWSPAPERS AND PERIODICALS: For use of the troops on duty on the Mexican border.

The question was presented as to whether newspapers and periodicals could lawfully be provided by the Quartermaster Corps for troops on duty on the Mexican border. The Army appropriation act of March 2, 1913 (37 Stat., 712), appropriates—

“For the necessary furniture, textbooks, paper, and equipment for the post schools and libraries.”

Held, that said provision in the Army appropriation act was limited by its terms to post schools and libraries, and that there being no other appropriation available for the purpose, no legal authority existed under which newspapers and periodicals could be purchased for the use of the troops in the situation indicated.

(5-243, J. A. G., Mar. 13, 1914.)

PAY CLERKS: Service with troops.

A paymaster's clerk of the Quartermaster's Department before its absorption into the Quartermaster Corps, during the period from April 19 to November 10, 1912, was on duty at Fort Leavenworth, Kans., as clerk to a paymaster who was assigned to duty at that post and whose only duties were connected with the payment of the troops thereat. The paymaster's clerk presented his claim to the accounting officers of the Treasury Department for reimbursement for the amount expended by him for the hire of quarters or for commutation of quarters during such period.

Held, that the paymaster was in the status of an officer serving with troops, and that his clerk should also be regarded as so serving for the purpose of determining his right to quarters or commutation thereof.

(72-333, J. A. G., Mar. 12, 1914.)

RESERVATIONS: Military; license to erect permanent structures thereon.

A certain banking company in Honolulu, H. T., applied for permission to open a branch banking house upon the Schofield Barracks Military Reservation, and for that purpose to erect thereon a suitable building. It proposed to do a general banking business, including the sale of exchange, and also to construct an adequate vault with safety deposit boxes and storage room for valuable packages.

Held, that from the plans submitted and from the stated purposes of the company it was evident that the structure in contemplation would be permanent in character; that it would be inconsistent to grant a revocable license for its construction; and that the executive had no authority to grant licenses for the construction of buildings of that character upon military reservations.

(80-816.1, J. A. G., Mar. 12, 1914.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the Office of the Judge Advocate General.)

CIVILIAN EMPLOYEES: Medical treatment; contract relations with the Government.

A member of the caretaking crew of certain Army transports out of commission at Newport News, Va., was injured during his employment, and it was found necessary to place him in a private hospital and to employ a private physician for his treatment. The caretaking crew was governed by the rules laid down for the Army Transport Service and such additional rules as were set forth relative to their duties as caretakers of the transports in question.

Held, that as there was nothing in the man's contract of employment or in the regulations for the service in which he was employed providing for hospital or surgical care at the expense of the Government, payment of the account of the hospital for medical services was not authorized. 20 Comp. Dec., 64.

(Comp. Geo. E. Downey, Mar. 21, 1914.)

CIVILIAN EMPLOYEES: Of the Quartermaster Corps; traveling and living expenses; temporary duty.

A wheelwright in the employ of the Quartermaster Corps at large, regularly stationed at Fort Sheridan, Ill., was directed by post special order dated October 4, 1913, confirming verbal order dated February 25, 1913, to proceed to Texas City, Tex., for temporary duty. Paragraph 733, Army Regulations, 1913, provides for the reimbursement of civilian employees of the War Department for actual expenses incurred while traveling under orders, as follows:

"5. Cost of meals, and lodgings including baths, tips, and laundry work, not to exceed \$4.50 a day while on duty at places designated in the orders for the performance of temporary duty, but reimbursement of such expenses will be limited to \$1 a day after the first 30 days at any one place, * * *."

Held, that the claimant's regular station being at Fort Sheridan, he was, while performing duty at Texas City under his orders,

absent from his regular station on temporary duty, and was entitled to reimbursement for traveling and living expenses as provided for in Army Regulations (20 Comp. Dec., 477), although it would seem that a service of about a year was rather too long still to be regarded as temporary. This question, however, was not decided.

(Comp. Geo. E. Downey, Mar. 24, 1914.)

CONTRACTS: For supplies; advertising and renewals after the fiscal year.

On submission of the question, by the Auditor for the Treasury Department, relative to contracts for the purchase of supplies in the Supervising Architect's Office, which contracts contained a provision for two annual renewals at the prices and upon the conditions stipulated therein, at the option of the department—

Held, that as the authority for the contracts was to be found in the annual appropriation acts they could not extend beyond the fiscal year for which the appropriation was made, and that the renewal of such a contract for a succeeding fiscal year, in accordance with the reservation contained in the original contract, was a new contract and was not made in compliance with the provisions of section 3709, Revised Statutes, requiring advertising for proposals in letting contracts for the purchase of supplies, the advertisement upon which the original contract was based extending only to the fiscal year to which is applied.

(Comp. Geo. E. Downey, Mar. 9, 1914.)

DESERTERS: Payment of expenses of apprehension; mistaken information.

The police authorities of Fresno, Cal., arrested a man suspected of desertion from the United States Army. The chief of police wrote to the commanding officer at the Presidio, San Francisco, informing him of the arrest and asking that the case be looked up and that they be informed of the situation, stating that they would hold the man for a few days pending such investigation. To this letter response was made by inclosing a deserter's circular describing the man in custody. The police authorities thereupon delivered the man to the military authorities at the Presidio, incurring an expense of \$23, and were then informed that the man was not wanted. The fact was that he had previously deserted, had been punished for desertion, among other things, by being dishonorably discharged from the Army, and was at the time only a civilian.

Held, that the man being only a civilian at the time of his arrest and delivery and not liable to apprehension as a deserter from the Army, payment of the claim for expenses incurred was not authorized, either from the appropriation for "Contingencies of the Army" or for "Incidental Expenses."

(Comp. Geo. E. Downey, Mar. 20, 1914.)

TRANSPORTATION: Rates on household goods; carriers risk.

The Baltimore & Ohio Railroad Co. claimed compensation for the transportation of household goods, professional books, etc., of an Army officer changing station. The transportation was furnished

on a Government bill of lading which contained the provision that "the shipment is at 'owner's risk' or released rates where tariff provides lower rates on that account, and at 'company's risk' where the tariff makes no such provision." In this shipment the tariff would have been higher if the goods had been shipped with unlimited liability than if shipped with limited liability in case of loss. The bill of lading bore the statement "carrier's risk."

Held, following the meaning which usage has placed upon the term "carrier's risk" stamped upon the bill of lading, the transportation should be paid for at the higher rate fixed for unlimited liability, but that to avoid doubt the term should be abandoned as not expressing any clear idea, and instead thereof the term "full valuation," "unlimited valuation," or some other similar expression definitely describing the condition of the shipment, should be used.

(Comp. Geo. E. Downey, Feb. 28, 1914.)

TRAVEL ALLOWANCES: To enlisted men on discharge; deduction for indebtedness due to the United States and to its instrumentalities.

A private soldier claimed that he was short paid for his travel allowance on discharge from the service December 19, 1913, and the question was submitted as to whether or not the act of August 24, 1912 (37 Stat., 576), regarding the travel allowances of soldiers on discharge, affected the practice of paying a soldier said travel allowances in full regardless of any indebtedness due to the Government or to its instrumentalities. For many years it was optional with the Government to furnish a soldier on discharge with transportation from place of discharge to place of enlistment, or to commute it (Sec. 1290, Rev. Stat.). The act of May 26, 1900 (31 Stat., 210), changed this to a straight commutation of 4 cents per mile. The act of August 24, 1912, *supra*, made it optional with the soldier to receive transportation in kind and subsistence from place of discharge to place of enlistment, or to any point of no greater distance, or to receive 2 cents per mile instead thereof.

Held, that when an enlisted man is discharged from the service and elects to receive 2 cents a mile in lieu of transportation in kind and subsistence for travel from place of his discharge to the place of his enlistment, such travel allowance is not subject to deduction to make good indebtedness of the soldier to the United States or to such instrumentalities of the Government as shall have been legally established, such as post exchanges, or company funds, and that the act of August 24, 1912, effected no change in the practice theretofore prevailing with regard to such indebtedness.

(Comp. Geo. E. Downey, Mar. 31, 1914.)

BULLETIN 20.

BULLETIN }
No. 20. }

WAR DEPARTMENT,
WASHINGTON, May 14, 1914.

The following digest of opinions of the Judge Advocate General for the month of April, 1914, and of certain decisions of the Comptroller of the Treasury and of the courts, is published for the information of the service in general.

[2094269 F—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

W. W. WOTHERSPOON,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ABSENCE: Leave of; payment for accumulated leave not taken.

A former civilian clerk of the Quartermaster Corps employed in Alaska at a salary of \$1,500 per annum was discharged without prejudice in pursuance of the law providing for the substitution of civilian employees in the Quartermaster Corps by men enlisted for that purpose. At the time of his discharge he had three months' annual leave which had accrued to his credit in accordance with War Department Circular A of January 12, 1913, which provided, in effect, for the accumulation of unused annual leave not to exceed 120 days for employees, citizens of the United States, on duty in Alaska and other places mentioned. He presented a claim for pay for such leave at the rate he was receiving when discharged.

Held, That the claimant was not entitled to pay for leave of absence of which he had failed to avail himself during the period of his employment, and that the claim could not be approved. 10 Comp. Dec. 15.

(2-152.1, J. A. G., Apr. 17, 1914.)

ADVERTISING: In newspapers; payment for, at sworn rates.

A newspaper requested a revision of its account with the Government for advertising from July 3, 1913, to February 23, 1914, so as to allow credit for a higher rate than that applied in the settlement of the account. It was claimed that the paper had adopted a new schedule of rates which became effective July 1, 1913, but it was unable to show the customary receipt of acknowledgment thereof,

and had only the office record that it was forwarded. The act of June 20, 1878 (20 Stat., 216), required advertising accounts to be paid for at a price not to exceed commercial rates charged to private individuals, with the usual discounts, such rates to be ascertained from sworn statements to be furnished by the proprietors or publishers of the newspapers proposing so to advertise. The department had no record of the receipt of the revised schedule, and if one had been received it would have requested the sworn statement required by the statute.

Held, that under the act of June 20, 1878, as well as under the law regulating contracts by correspondence, the rates filed and supported by the sworn statement required by the statute amounted to an offer which continued until notice of the revocation thereof by the adoption of a new schedule was actually brought home to the department (9 Cyc., 296); that until then all advertising must be regarded as having been given and accepted at the old rates; and that the department was without authority to allow the credit asked for.

(76-741, J. A. G., Apr. 28, 1914.)

ARMY: Appointment to, from civil life; qualifications of candidates for second lieutenant of Engineers.

Section 5 of the river and harbor act of February 27, 1911 (36 Stat., 957), provided in part that—

“To become eligible for examination and appointment, a civilian candidate for the appointment as second lieutenant [of Engineers] must be an unmarried citizen of the United States between the ages of twenty-one and twenty-nine, who holds a diploma showing graduation in an engineering course from an approved technical school, and is eligible for appointment as a junior engineer under the Engineer Bureau of the War Department.”

Section 3 of Civil-Service Rule VI provided that the term of eligibility of an applicant for an appointment should be one year from the date on which the name of the eligible was entered on the register, which term might be extended under certain conditions.

Held, that the statute was explicit in prescribing the qualifications of an applicant for appointment as second lieutenant of engineers from civil life, and that, before a candidate could be admitted to examination for such appointment, it was necessary that he should be eligible for appointment as junior engineer under civil-service rules at the time of said examination.

(64-213, J. A. G., Apr. 11, 1914.)

INDIANS: Citizenship of; constitution of the militia.

The question arose as to whether certain Indians enrolled at the United States Indian School at Phoenix, Ariz., were citizens within the meaning of section 1 of the militia act of January 21, 1903, as amended by the act of May 27, 1908 (35 Stat., 399), which reads in part as follows:

“The militia shall consist of every able-bodied male citizen of the respective States and Territories and the District of Columbia, and

every able-bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age."

Held, that Indians born within the territorial limits of the United States, members of and owing allegiance to one of the Indian tribes recognized as a tribe by the Federal Government, were not citizens by birth within the meaning of section 1 of the fourteenth amendment to the Constitution of the United States, and could become citizens only by being naturalized under some treaty or statute; and, upon the understanding that the Indians mentioned were in such condition and had not been so naturalized, *held further*, that they were not citizens within the meaning of section 1 of the militia act of January 21, 1903, as amended by the act of May 27, 1908.

(13-111.2, J. A. G., Apr. 11, 1914.)

LEASES: Repairs to building for the Signal Corps; damage by fire.

The building leased for the use of the Signal Corps laboratory in Washington, D. C., was partially destroyed by fire March 18, 1914. The lease contained a provision relative to repairs as follows:

"That the party of the first part [the United States] shall make all such betterments and repairs of every kind as may be deemed necessary for the purpose for which the premises are used, and upon the expiration of the term of this lease, and of any renewal thereof (or on relinquishment under the reservation therefor), shall surrender the premises in as good condition as they now are, the usual wear, inevitable accidents, and loss by fire excepted."

Held, that the provision in the lease relative to the making of such betterments and repairs as might be deemed necessary for the purposes for which the premises were used, referred only to such alterations and repairs as might be required for the particular purposes specified, and not to repairs in the ordinary acceptation of the term, and that the general rule that a lessee, in the absence of express covenant, is not bound to rebuild or repair in case of loss by fire, as well as the express exception of losses by fire from the provision to surrender the premises in as good condition as they were at the time of the execution of the lease, relieved the United States from any obligation to make repairs necessitated by said fire.

(80-718, J. A. G., Apr. 15, 1914.)

MEDICAL ATTENDANCE: Soldier on pass; status as to duty.

A private soldier stationed at Fort Davis, Alaska, while absent on a pass extending from 6.30 p. m. to 6 a. m. of the second day following, received a serious gunshot wound in a house which he was visiting, from which wound he afterwards died. At the time of receiving this wound he had ample time in which to return to his station before the expiration of his pass. He was taken by his comrades to a private hospital where he received hospital and medical treatment for which treatment a bill was rendered.

Held, that as the soldier was absent from his regular station on pass at the time he received the injury he was not in a duty status so

as to entitle him to civilian medical attendance, and having by his own act placed himself beyond the reach of the means of medical attendance provided by the Government, he was not entitled to be treated at a private hospital at Government expense. *Held therefore*, that the bill for services rendered by the hospital could not be paid. The opinions contained in paragraph 8, page 254, Dig. Op. J. A. G., 1912, in so far as they expressed the rule that an officer or a soldier absent from duty for his own purposes under verbal permit or pass not exceeding 24 hours is entitled during such absence to civilian medical attendance at Government expense, were overruled. (60-227.6, J. A. G., Apr. 1, 1914.)

OFFICES: Holding two; National Home for Disabled Volunteer Soldiers.

A colonel on the retired list of the Army receiving as such a salary of \$3,750 per annum, was serving as governor of a national home for disabled volunteer soldiers at a salary of \$3,000 per annum, which latter position was established by section 4829, Revised Statutes, as amended by the act of June 28, 1902 (32 Stat., 472).

Held, that such retired officer was entitled to occupy the position of governor of a national home and receive the compensation therefor, notwithstanding the fact that he was a retired officer receiving more than \$2,500 per annum, as an officer of the home was not an officer of the United States within the meaning of section 2 of the act of July 31, 1894 (28 Stat., 205). 8 Comp. Dec., 443.

(88-541.1, J. A. G., Apr. 11, 1914.)

PRIVATE PROPERTY: Loss of, at post laundry; bailment for mutual benefit.

The clothing of certain soldiers was stolen from the post laundry, where the articles had been left for pressing or washing. On shutting down the laundry on the evening of the night preceding the theft the superintendent had personally inspected all the windows and doors and was positive that they had been securely locked. The laundry was entered by breaking the glass in a window, removing the glass, and then unfastening the window.

Held, that this case was an ordinary bailment for mutual benefit in respect to which the rule was well settled that the bailee is held to the exercise of ordinary care in relation to the subject matter of the bailment and is responsible only for ordinary negligence (5 Cyc., 184); and that as it appeared that the precautions taken to prevent this theft were those that would have been taken by a cautious man, and as there was no express undertaking on the part of the laundry to insure the property, the laundry was not liable for the loss.

(18-410, J. A. G., Apr. 4, 1914.)

PRIVATE PROPERTY: Stoppage of pay of soldiers to reimburse damages to; fifty-fourth article of war; liability for tort.

The place of business of a private individual near Galveston, Tex., was burned and indications were that the fire was caused by soldiers,

but a board of officers convened for the purpose of inquiring into and reporting upon the matter was unable to ascertain from the evidence what particular men had set it on fire. The board fixed upon an amount of damage which the owner agreed in writing to accept in full satisfaction of his claim.

Held, that the claim could not be settled as one against the Government, as the latter is not responsible for the unlawful acts of its soldiers or employees, and that the ordinary remedy was by suit against the individuals who committed the trespass or by application for relief by Congress. *Held further*, that the case seemed to be one coming under the provisions of the fifty-fourth article of war, which provides for reimbursement out of their pay for damage to private property growing out of torts committed by soldiers; and *advised*, that the board be reconvened for the purpose of submitting a definite recommendation under that article, and that the board be informed that the issues should be determined, not beyond a reasonable doubt, but by a preponderance of evidence.

(18-420, J. A. G., Apr. 4, 1914.)

PUBLIC PROPERTY: Issued to the militia; accountability; charging appropriations.

The State of Montana was about to turn back to the United States certain sabers and equipments which had been issued to it for the use of its organized militia, but were no longer required for such purpose. The sabers were still serviceable, and it was desired to repair and reissue them to the organized militia of other States making requisition therefor. Section 1661, Revised Statutes, as amended, appropriates annually \$2,000,000 for "providing arms, ordnance stores, quartermaster stores, and camp equipage for issue to the militia." Section 8 of the act of May 27, 1908 (35 Stat., 401), amending section 13 of the militia act of January 21, 1903 (32 Stat., 777), appropriated \$2,000,000 for the purchase or manufacture of arms for equipping the organized militia, without charging allotments to the several States from the appropriation made by section 1661, Revised Statutes.

Held, that if said property was issued at the expense of the appropriation contained in section 1661, Revised Statutes, on return of the same, a corresponding credit should be given to the State's allotment under section 1661, Revised Statutes, equal to the actual value of such property when returned, and the State thereupon relieved from further accountability therefor, but if it was issued under the provisions of section 8 of the act of May 27, 1908, the State, on surrender of the property, would be relieved from further accountability for the same, but would not be entitled to any additional credit.

Held further, that the Ordnance Department would be authorized to repair said property at the expense of the appropriation under which it was issued, and to reissue the same to other organized militia under authority of the appropriation out of which the property had been purchased.

(58-300, J. A. G., Apr. 16, 1914.)

PUBLIC PROPERTY: Sale of subsistence stores to other departments; 10 per cent additional to cost price to cover wastage.

The act of March 3, 1911 (36 Stat., 1047), provided for the sale by the War Department under Army Regulations of subsistence stores to other bureaus of said department, and to other executive departments of the Government, or to the employees thereof, and further provided that—

“When the transaction is between the Subsistence Department and another executive department of the Government or employees thereof, the price to be charged shall include the contract or invoice price and 10 per centum additional to cover wastage in transit, and the cost of transportation.”

A number of emergency rations had been sold by the Subsistence Department of the Army to the officer in charge of the navy yard at New York, and had been charged for on the bill at the cost or invoice price, with 10 per cent additional and the cost of transportation added. It was stated that no loss had occurred through wastage.

Held, that the addition of 10 per cent to the cost price of subsistence stores sold to another executive department was a statutory requirement, and could not be disregarded, although no wastage was shown, and that the additional 10 per cent should be included in the bill rendered for this sale.

(80-135, J. A. G., Apr. 23, 1914.)

TAXATION: On operations of the Government; license fee for men enlisted in the Quartermaster Corps for chauffeurs.

The question arose as to the reimbursement for license fees at the rate of \$2 each charged by the Philippine Government to certain enlisted chauffeurs in the Quartermaster Corps at Manila, P. I., for the privilege of operating motor vehicles, whether belonging to the United States Government or to private individuals.

Held, that it is a fundamental principle of law that the property and instrumentalities of the United States Government by which it performs its proper governmental functions, can not be taxed by a State or municipality; that the license fees in question were a tax and not a reimbursement for services rendered, and practically amounted to a tax upon a Government instrumentality, which, if permitted, would amount to a regulation by the Philippine Government of the internal administration of the Army; that the Philippine Government had no authority to require licenses of men enlisted as chauffeurs in the Army for operating Government automobiles in the performance of their duties; and that the amounts advanced for licenses did not constitute a proper charge against the United States.

(90-125, J. A. G., Apr. 21, 1914.)

TELEGRAPH SERVICE: Charges for, to other departments of the Government; Washington-Alaska Military Cable & Telegraph System.

The Chief Signal Officer of the Army recommended that a charge be made for official messages transmitted over the Washington-Alaska Telegraph & Cable System in Alaska by officials of the Terri-

tory of Alaska and by departments other than the War Department, of one-half of the established commercial rate as fixed by the Postmaster General for Government messages transmitted over commercial Pacific cables.

Held, that there was no legal objection to this action, in view of the authority conferred upon the Secretary of War by the act of May 26, 1900 (31 Stat., 206), authorizing commercial business to be done over the said system under such conditions as might be deemed by him "equitable in the public interests," and that the charge so fixed would probably be accepted, in the absence of a showing to the contrary, as a proper charge to other departments of the Government for the cost of the service furnished them; *and held further*, that payments made by other departments for services so rendered might be accounted for and paid into the Treasury of the United States as prescribed for commercial business.

(80-471, J. A. G., Apr. 8, 1914.)

TRAVEL ALLOWANCES: Medical officers discharged with one year's pay; mileage and transportation of private property.

The act of March 2, 1901 (31 Stat., 902), provides:

"That hereafter when an officer shall be discharged from the service except by way of punishment for an offense, he shall receive for travel allowances from the place of his discharge to the place of his residence at the time of his appointment or to the place of his original muster into the service four cents per mile."

Two medical officers were honorably discharged from the service of the United States with one year's pay under the provisions of section 5 of the act of April 23, 1908 (35 Stat., 67).

Held, that the mileage allowance provided for by said act of March 2, 1901, must be treated as a full compensation for all traveling expenses from place of discharge to place of original muster into the service, and that the officers were not entitled to transportation of their baggage and mounts at Government expense on such discharge.

(94-236, J. A. G., Apr. 4, 1914.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

APPOINTMENT: Member of Army Nurse Corps; time of taking effect; expenses.

An appointment in the Army Nurse Corps was mailed to the appointee December 23, 1913, at a civilian hospital in Colorado, where she was employed, together with a blank form of oath for execution and return. She was informed that upon receipt of the oath duly executed, the necessary orders and transportation request would be issued to her, and that she should not commence her journey to her future place of duty until after receipt of assignment orders. The oath was executed December 29, 1913, and received back by the Sur-

geon General January 2, 1914, whereupon an order was forwarded to her directing her to proceed without delay to Letterman General Hospital, San Francisco, Cal., for assignment to duty. This order was received by her January 8, 1914, and she reported at the Letterman General Hospital January 10 following. She presented a claim for living expenses between December 29, 1913, date of taking the oath, and January 8, 1914, date of receiving her appointment and travel orders.

Section 19 of the act of February 2, 1901 (31 Stat., 753), establishing a Nurse Corps (female) in the Army, provided that "they shall be entitled to quarters, subsistence, and medical attendance during illness."

Held, that during the period covered by her claim, said nurse was in a duty status awaiting assignment and travel orders, and under such circumstances was entitled to the pay and allowances authorized by law and regulations covering the period from date of taking the oath to date of receipt of and compliance with her orders to proceed to Letterman General Hospital, the charge for subsistence and room rent not to exceed what it would have cost the United States to have furnished her subsistence and the quarters, heated and lighted, which she occupied, and not to exceed such allowances as were authorized by regulation.

(Comp. George E. Downey, Apr. 2, 1914.)

CLERKS AND EMPLOYEES: Pay during suspension under charges; restored to duty.

A clerk in a United States local land office was suspended from duty without pay pending the investigation of charges against him involving an assault upon the register of the office. He was acquitted of the charge of felonious assault after trial before a jury. He was then, by order of the Commissioner of the General Land Office, restored to duty, and transferred to another office. The Commissioner directed that his salary be paid from and including the date of suspension.

Held, that where an employee has been legally suspended without pay by authority of the head of a department pending investigation of charges, and after the investigation an order is issued restoring him to duty with pay from date of suspension, such order will not be construed as operating retroactively to entitle the employee to pay during such period. See case of Lounsberry, 11 Comp. Dec., 66.

(20 Comp. Dec. 505, Jan. 16, 1914.)

DAMAGES: Liquidated; contract for quantities at unit rates; delay in completion.

A construction company entered into a contract with the United States at unit prices to furnish 140 oak piles, 350 tons of stone, and 350 cords of brush, and to drive the piles and place the stone and brush as specified, the evident purpose being to protect the beach front at a certain lighthouse station from wave action and erosion. The contract provided for the deduction of \$5 per day as liquidated damages for each and every day's delay in the completion of the work

beyond the time specified therefor. There was a delay of 16 days in completion of the work beyond the time limit.

Held, that from the nature of the contract there was no possibility that the same damages would result from a partial as from an entire failure to complete the work in time, and the provision for liquidated damages, viewed in connection with the subject matter of the contract, was palpably not intended as a liquidation of damages for the delay, and must be interpreted as a provision for a penalty, and that such provision was enforceable only to the extent of any actual damages occasioned to the Government by the contractor's delay. 19 Comp. Dec. 20; 20 Id. 16.

(Comp. George E. Downey, Apr. 15, 1914.)

PHILIPPINE SCOUTS: Higher pay for services with; absence on sick leave taken while surveyor of port.

Section 36 of the act of February 2, 1901 (31 Stat., 757), provided for the organization of the Philippine Scouts into squadrons or battalions corresponding to similar organizations in the cavalry and infantry arms of the service, and further provided that—

"The majors to command the squadrons and battalions shall be selected by the President from captains of the line of the Regular Army, and while so serving they shall have the rank, pay, and allowances of the grade of major. The captains of the troops or companies shall be selected by the President from first lieutenants of the line of the Regular Army, and while so serving they shall have the rank, pay, and allowances of captain of the arm to which assigned."

A captain in the Army was detailed for duty with the Philippine Scouts under said law. During said detail he was on detached service as surveying officer of the port of Manila, P. I., from April 11 to June 26, 1912, and was absent sick from June 27 to September 14, 1912. He was paid the pay and allowances of a major. The Auditor disallowed the excess above the pay and allowances of captain on the ground that the law did not authorize the higher pay to an officer unless he was actually performing duty with the Philippine Scouts.

Held, that under the law above quoted it was not sufficient that an officer be merely detailed with the Scouts to entitle him to the higher pay of the grade, but that he must perform service with them, and if the service was not rendered, the higher pay was not earned.

Held further, that duty as surveying officer at Manila for a part of the time was not service with the Scouts; that, as he was absent sick from this duty, such absence would not be regarded as service; and that the claim for higher pay was properly disallowed.

(Comp. George E. Downey, Apr. 20, 1914.)

TIME: Computation of for pay purposes; days in February; leave without pay.

A clerk of class three in the War Department was absent on authorized leave without pay for thirty days from 10.40 a. m., of February 24, 1914, and returned to duty March 27, 1914. For such absence in February, the Auditor for the War Department, in making settlement, deducted from her monthly salary for that month pay

for the number of days necessary to make the month one of thirty days, or two days in addition to the number actually absent during the month, corresponding to the theoretical days of February 29th and 30th. The act of June 30, 1906 (34 Stat., 763), provided certain rules for the division of time and computation of pay for services rendered, as follows:

1. Annual compensation shall be divided into twelve equal installments, one for each calendar month.
2. In paying for a fractional part of a month one-thirtieth of a monthly installment or of a monthly compensation shall be the daily rate of pay.
3. Every month shall be held to consist of thirty days.
4. The thirty-first day of a thirty-one day month shall be excluded from computation.
5. February shall be treated as if it actually had thirty days.
6. One entering the service during a thirty-one day month and serving until the end thereof shall be paid from the date of entry to the thirtieth inclusive.
7. One entering the service during February and serving until the end thereof shall be paid a month's pay less as many thirtieths as there were days elapsed prior to date of entry.
8. One day's absence on the thirty-first of a month shall forfeit a day's pay.

Held, that the theoretical days of the 29th and 30th of February do not attach themselves to nor confer any benefit for services performed on any days of said month previous to the 28th, are used only as a basis of computation, and, by virtue of the express provisions of the statute, they attach themselves to and become practically a part of the 28th day. *Held further*, that the action of the Auditor for the War Department was correct, and deduction for absence should be made for two days in addition to those accruing up to and including the 28th, in computing pay due for the month of February.

The decision in 13 Comp. Dec., 205, so far as it conflicted with this principle, and others following that as a precedent were overruled.

(Comp. George E. Downey, April 30, 1914.)

TRANSPORTATION: Freight rates; land-grant deduction; goods not owned by the United States.

Certain furniture purchased for the use of the United States was shipped on a Government bill of lading from York, Pa., to San Diego, Cal., under a contract by which the contractor was to furnish and install the same in the post-office building at the latter place. The title to the furniture remained in the manufacturer and did not vest in the United States until said furniture was transported to and installed in the Federal building at San Diego.

Held, that where the Government purchases property to be delivered at a certain point, and assumes no interest therein nor obligation with reference thereto until such delivery, and where the transportation charges are not payable by the United States, shipment thereof is of no concern to the Government, and the use of a Govern-

ment bill of lading for the shipment is improper. *Held further*, that the use of the Government bill of lading was not conclusive of the question, and that, as the property transported was not Government property, it should bear the full commercial rates without land-grant deduction.

(Comp. George E. Downey, Apr. 4, 1914.)

TRANSPORTATION: Passenger party rates; one request, but no ticket issued.

Three separate parties of more than 10 men each were transported over the El Paso & Southwestern Railroad system. One transportation request was issued for each party, and the members of each party traveled together, but no tickets were issued either for the parties as a whole or for the individuals, but transportation was provided on the regular transportation requests. The company claimed for passenger service furnished at individual rates, contending that the case did not fall within the company's tariff rates for party fares, which provided only for "one way continuous passage fares for parties of 10 or more adults * * * traveling together on one ticket, where cash is paid on delivery of ticket." It was stated that no party ticket was requested or furnished, and that none of the parties traveled together on a party ticket.

Held, that the substantial difference between party service and individual service was that in the former case the entire number of passengers traveled together as an entity, while in the latter case each individual traveled as a separate entity and was dealt with by the company as one for whom a separate ticket is furnished and accounted for by the conductor; that the service in said case conformed substantially to party service; and that the cash condition in the party tariff did not affect the rate to be charged the Government (20 Comp. Dec. 77). *Held therefore*, that settlement should be made on the party-rate basis.

(Comp. George E. Downey, Apr. 20, 1914.)

DECISIONS OF THE COURTS.

(Digests prepared in the office of the Judge Advocate General.)

DAMAGES: Liquidated; extension of time by supplemental contract.

A contract for the construction of an electric lighting system at Fort Wm. McKinley, P. I., provided that the work should be completed by October 27, 1907, and in case of default the contractor agreed to pay \$25 a day as liquidated damages for delay beyond the period fixed for completion. Two days before the time for completing the work a further contract was entered into extending the time for completion to December 31, 1907, and by this time the work was duly completed and the same was accepted by the Government. In the settlement, the sum of \$1,625 was deducted, which included liquidated damages for time of delay beyond October 27, 1907, the date fixed in the original contract for the completion of the work, and also the sum of \$405 for the services of a Government electrical engineer during such extension period.

Held, that the officer who made the first contract had authority to modify it if he did not thereby give away any accrued rights of the Government, and as no right to liquidated damages had accrued at the time of the modification of the original contract, and as the work had been completed within the extended time, the contractor was improperly charged with the liquidated damages and was entitled to judgment for the amount retained.

Germann & Co. v. United States, U. S. Court of Claims, No. 30830, Mar. 16, 1914.)

EVIDENCE: Credibility of an accused as a witness.

The court had charged the jury in a murder trial where the defendant has testified on his own behalf that—

“A witness who has no interest whatever in the outcome of a lawsuit, who is entirely disinterested, other things being equal, is entitled to very much more credence than a witness who is interested in the verdict of the jury. Especially is that so where the witness is contradicted by other witnesses.”

Held, that this instruction was erroneous and that—

“A disinterested witness is not necessarily entitled to any more credit than an interested witness, but the whole question of his credibility is for the jury.”

(*People v. Gerdvine*, Court of Appeals of New York, 104 N. E., 129.)

PARDONS: Conditional; revocation of.

The relator had been convicted and sentenced to imprisonment for life. The Governor of the State granted him a pardon upon the condition that the beneficiary must conduct himself as a good and law-abiding citizen and not again violate the laws of the State. The condition was accepted and the prisoner released; but thereafter the governor issued a proclamation revoking and annulling the conditional pardon and ordering the rearrest and confinement of the prisoner on the ground that since the said conditional pardon was granted further evidence had been presented, and it was not thought that the prisoner was deserving of clemency at that time. Upon hearing on a writ of habeas corpus,

Held, that the power to grant an absolute pardon carries with it power to grant a conditional pardon and to make the pardon contingent upon any conditions, so long as they are not illegal, that the pardoning power desires to impose; that the power to grant pardons does not carry with it the power to revoke them; that a conditional pardon, like an unconditional one, could not, when granted, be revoked by the pardoning power except for a violation of a condition; and that the governor could not revoke a conditional pardon on the ground that after-discovered evidence lead him to believe that clemency was ill advised. *Held further*, that a pardon once granted will not be revoked merely upon the allegation that it was procured by fraud, but the fraud must be judicially ascertained. The prisoner was therefore discharged.

(*Ex parte Rice*, Criminal Court of Appeals of Texas, 162 S. W., 891.)

BULLETIN 25.

BULLETIN }
No. 25. }

WAR DEPARTMENT,
WASHINGTON, June 18, 1914.

The following digest of opinions of the Judge Advocate General of the Army for the month of May, 1914, and of certain decisions of the Comptroller of the Treasury and of the courts, is published for the information of the service in general.

[2094269 G—A.G.O.]

BY ORDER OF THE SECRETARY OF WAR:

W. W. WOTHERSPOON,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ALASKAN RAILROAD: Detail of Cavalry officer as one of a commission to locate; detail of officers of the Engineer Corps; additional compensation.

The act of March 12, 1914 (Pub. No. 69, 63d Cong.) provided for the location, construction, and operation of railroads in Alaska, and empowered the President, among other things—"to employ such officers, agents, or agencies, in his discretion, as may be necessary to enable him to carry out the purposes of this act; to authorize and require such officers, agents, or agencies to perform any or all of the duties imposed upon him by the terms of this act; to detail and require any officer or officers in the Engineer Corps in the Army or Navy to perform service under this act; to fix the compensation of all officers, agents, or employees appointed or designated by him;" etc.

Under authority of said act, it was proposed to create an Alaskan engineering commission to locate the railroad in Alaska, and it was also proposed to appoint an officer of the Cavalry of the Army as a member of said commission.

Held, that the duties which the officer would be called upon to perform would be within the prohibition of section 1222, Revised Statutes, and that he could not accept the appointment and perform the duties thereunder without vacating his commission in the Army.

(64-312, J. A. G., May 1, 1914.)

A joint resolution having been introduced in Congress authorizing the President "to detail and require" the officer in question to perform duty in connection with the said Alaskan railroad.

Held further, that such resolution would remove the prohibition of section 1222, Revised Statutes, against the appointment of the officer;

that the pay of the officer would continue while detailed as a member of said commission; and that under the authority conferred upon the President "to fix the compensation of all officers, agents, or employees appointed or designated by him" for service in connection with said railroad, it was within his power to supplement the pay of the officer by such amount as he might deem equitable and to supplement the pay of the other officers of the Army and the officers of the Navy authorized to be detailed for such service.

(*Idem*, May 18, 1914.)

BAGGAGE: Transportation of change of station allowance of, of officers on duty with the Government of the Canal Zone; appropriation available.

An officer ordered to duty with the Government of the Canal Zone desired to have a part of his change of station allowance of baggage transported from the United States to the Canal Zone on Government bill of lading.

Held, that the assignment of officers of the Army to duty with the Government of the Canal Zone was authorized by special law which duty was purely civil in character, and that the expense of transporting the change of station allowance of baggage of an officer so assigned from the United States to his post of duty with the Government of the Canal Zone, should be borne by the appropriation for said Government, and not by the appropriation for the transportation of the Army.

(94-233, J. A. G., May 12, 1914.)

BURIAL EXPENSES: Of accepted applicant for enlistment; appropriation.

An accepted applicant for enlistment in the Army died at Columbus Barracks, Ohio, before regular enlistment in the service and when presumably he was receiving medical treatment at the expense of the Government under authority of the act of Congress approved March 2, 1913 (37 Stat., 718), which appropriated, among other things, "for medical care and treatment not otherwise provided for, * * * of applicants for enlistment."

Held, that the care and custody of the remains of the deceased were by his death cast upon the Government, and it became its duty to dispose of them in a proper manner in the interests of decency and sanitation where no one better entitled to the custody applied to perform this service, and that the expenses should be charged against the appropriation for incidental expenses of the recruiting service under the appropriation for incidental expenses of the Quartermaster Corps. See 11 Comp. Dec., 789.

(5-244, J. A. G., May 26, 1914.)

COMMAND: Officers of the Quartermaster Corps in charge of post temporarily vacated; functions of commanding officer.

A major of the Quartermaster Corps came into the charge of a post temporarily vacated by its garrison, under the operation of paragraph 214, Army Regulations, 1913, which provided that military posts temporarily evacuated by troops will be under charge of the

Quartermaster Corps. Certain troops of the Quartermaster Corps and of the Hospital Corps were left at the post. A line officer, junior to the quartermaster in charge, was under orders to proceed to the post and report to the commanding officer.

Paragraph 18 of the same regulations provided that an officer of the Quartermasters Corps "shall not assume command of troops unless put on duty under orders which specially so direct, by authority of the President," and paragraph 13 of the same regulations provided that—

"Command is exercised by virtue of office and the special assignment of officers holding military rank who are eligible by law to exercise command"; and that an officer could not put himself on duty without orders from competent authority.

Held, that a major of the Quartermaster Corps coming into the charge of a post, although eligible to command could not place himself in command of the post or exercise the functions of a commanding officer without special assignment from the President, and could not as such commanding officer issue direct orders directing travel or appoint a summary court officer who would have jurisdiction to try members of the Hospital Corps or any other than members of the Quartermaster Corps, or appoint a recruiting officer; that he should sign official communications as "quartermaster in charge" and not as commanding officer, and since there was no commanding officer at the post, the signature of the quartermaster in charge should be accepted as equivalent to that of the commanding officer, except where such signature implied the performance of duty which could be performed only by the commanding officer; that should a line officer assume command of the post he would not be authorized to place members of the Quartermaster Corps on guard at the post, as that would be requiring them to perform military duties not pertaining to their corps, but that they might be placed on guard by the quartermaster in charge if, in his opinion, a guard was necessary to the safekeeping of the property under his care at the post; and that should a junior line officer arrive at the post pursuant to orders requiring him to report to the commanding officer thereof, he would be in command of the post by virtue of his commission and special assignment.

(20-410.1, J. A. G., May 9, 1914.)

DETACHED SERVICE: With the Philippine Constabulary; act of April 27, 1914; Bureau of Insular Affairs.

The act of August 24, 1912 (37 Stat., 571), which prohibited, under certain circumstances, detached service of officers of company grade, provided that such prohibition should not apply—

"to detachment or detail of officers for duty * * * in the Philippine Constabulary until the first day of January, nineteen hundred and fourteen," and further that—

"Hereafter no officer holding a permanent commission in the Army with rank below that of major shall be detailed as assistant to the Chief of the Bureau of Insular Affairs, or * * * as chief or assistant chief (Director or Assistant Director) of the Philippine Constabulary, and no other officers of the Army shall hereafter

be detailed for duty with the said constabulary except as specifically provided by law."

The detached-service law of April 27, 1914 (Pub. No. 91, p. 7), similarly prohibited the detachment of officers of field grade, and further provided that the prohibition should not apply—

"to the detachment or detail of officers for duty in connection with the construction of the Panama Canal until after such canal shall have been formally opened, or in connection with the Alaska Road Commission or the Alaska Railroad or the Bureau of Insular Affairs."

Held, that the detail of officers of the Army for service as Chiefs of the Philippine Constabulary could not properly be said to be details for duty in connection with the Bureau of Insular Affairs, and hence such details were not within the exception in the act of April 27, 1914. *Held, therefore*, that the prohibitions in the statute applied to details of officers for service with the Philippine Constabulary.

(6-124, J. A. G., May 2, 1914.)

DETACHED SERVICE: Officer above the grade of major detailed to vacancy in a staff department; duty with troops.

Section 26 of the act of February 2, 1901 (31 Stat., 755), provided that future vacancies in the staff departments falling within the purview of that section which could not be filled by promotion should be filled by detail from the line of the Army, and that—

"All officers so detailed shall serve for a period of four years, at the expiration of which time they shall return to duty with the line, and officers below the rank of lieutenant colonel shall not again be eligible for selection for duty in any staff department until they shall have served two years with the line."

The act of April 27, 1914 (Pub. No. 91, 63d Cong., p. 7), appropriating for the Army for the fiscal year 1915, provided that—

"After September first, nineteen hundred and fourteen, in time of peace, whenever any officer holding a permanent position in the line of the Army, with the rank of colonel, lieutenant colonel, or major, shall not have been actually present for duty for at least two years out of the last preceding six years with a command composed of not less than two troops, batteries or companies of that branch of the Army in which he shall hold said commission, such officer shall not be detached nor permitted to remain detached from such command for duty of any kind except as hereinafter specifically provided"—

but further provided that nothing in said act should prevent the redetail of officers above the grade of major to fill vacancies in the various staff corps and departments, as provided by section 26 of the act of February 2, 1901.

An officer above the grade of major was serving a detail in a staff department under section 26 of said act of February 2, 1901, and would not, on September 1, 1914, have been on duty with troops for two years out of the last preceding six years.

Held, that the law did not require his relief from detail on that date, and that, if relieved, he would immediately be available for redetail to fill a vacancy within the purview of said section 26, irre-

spective of his former detail, and irrespective of his duty status during the previous six years.

(6-124, J. A. G., May 11, 1914.)

DONATIONS: Of property and services to the United States; placing improvements.

Private parties requested permission to remove a wooden picket fence surrounding a national cemetery and to replace the same by an artistic permanent fence, without expense to the United States.

Section 3679, Revised Statutes, as amended by the act of February 27, 1906 (34 Stat., 49), provided—

“Nor shall any department or any officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property.”

Held, that there was no statute which prohibited the acceptance by Government officers of donations of personal property on behalf of the United States, but that as the proposition here involved the acceptance of both personal property and personal services, the offer could not be accepted, as it would amount to an acceptance of voluntary services, which was forbidden by the statute; but that there would be no objection to the acceptance of material for the construction of the fence, if sufficient funds were available for the removal of the old fence and the construction of the new one.

(80-111, J. A. G., May 11, 1914.)

EIGHT-HOUR LAWS: Public works of the United States; railroad to be used in the construction of a Government work.

By the terms of a proposed contract a railroad company was to furnish all the labor and materials for the construction of a spur track from its main line to the site of a Government lock and dam under construction, and to transport material over said line for said Government work. The company was further required to procure the necessary right of way for the spur track and to maintain the track for a period sufficient for the construction of the lock and dam, not exceeding three years. It was further provided that the company should remove such portion of the spur track as might be on the Government reservation when the same was of no further use for said construction. A specified sum was named as compensation for the construction of the spur track and for the transportation of materials.

Held, that as the title to the railway was to remain in the railway company and the track was not intended to become a part of the public work for the construction of which the material was to be transported over said road, the eight-hour law of August 1, 1892, as amended by the act of March 3, 1913 (37 Stat., 726), had no application. *Held further*, that the act of June 19, 1912 (37 Stat. 137), regarding hours of labor in Government contracts, did not apply, as said act expressly provided that nothing therein should

apply "to contracts for transportation by land or water," and as it appeared that the whole purpose of the contract was to provide transportation of materials between the terminus of the railway and the lock and dam site.

(32-213, J. A. G., May 1, 1914.)

EIGHT-HOUR LAWS: Manufacture of tools and appliances.

An opinion was desired as to what tools, jigs, and fixtures required for prosecuting work on a Government contract coming under the eight-hour law should be manufactured under said law.

Held, that the manufacture of molds and forms made for and used solely in the manufacture of particular articles coming under the restrictions of the eight-hour law should be regarded as a part of the manufacture of the particular articles and as coming under the provisions of said law; but that tools which might be used on other contracts and which remain the property of the contractor, formed a part of his plant, and their manufacture should not be regarded as a part of the manufacture of the particular articles covered by the contract, and hence were not within the eight-hour law.

(32-300, J. A. G., May 14, 1914.)

EIGHT-HOUR LAWS: Payment for overtime work; fixed salaries.

Certain laborers were employed in the Quartermaster Department at Jeffersonville, Ind., beyond the legal limit of eight hours in one day, in packing and shipping Government supplies, and a roll was prepared for paying for this overtime. The men were under the impression that eight hours constituted a day's work, and had been informed that "if permissible under the law" an effort would be made to compensate them for the additional service. They were not specifically appropriated for by law but were paid annual salaries from a lump-sum appropriation.

Held, that section 3738, Revised Statutes, providing that—"Eight hours shall constitute a day's work for all laborers, workmen, and mechanics who may be employed by or on behalf of the United States," does not amount to a contract between the Government and its laborers, but is in the nature of a direction by the Government to its agents (*United States v. Martin*, 94 U. S., 400); that the Government was entitled to the full service of these men; and that they could not be allowed anything beyond their stated compensations.

(32-232, J. A. G., May 28, 1914.)

IMPROVEMENTS: Roadways on land fronting national cemeteries; title of the United States; boundaries.

It was proposed to improve the frontage of two national cemeteries within the corporate limits of cities where the same abutted upon public highways, by the construction, in one case, of a concrete walk with parking on either side to be set in grass, and in the other case

by the construction of a sidewalk. The deeds to the United States for the lands in the national cemeteries, described the same by courses and distances, running to and along the side lines of the road or street on which they abutted. There was not sufficient land within the lines outside of the cemetery inclosures upon which to construct the improvements, so that they would have to rest partly or wholly upon the adjoining highway.

The appropriation for maintaining and improving national cemeteries in the sundry civil act of June 23, 1913 (38 Stat., 31), provided that no part of the sum appropriated—

"shall be used for repairing any roadway not owned by the United States within the corporate limits of any city, town, or village."

Held, that where land is described by courses and distances, beginning at a point and running to a road or highway and thence on a line with the same, the measurements being exact, and extending only to the margin of such road or highway, the title to no part of the road passes, and the grantee can claim nothing beyond the boundary line described (5 Cyc., 906 n.; 8 Cent. Dig., Boundaries, § 123); that the Government therefore did not own any part of the roadways upon which the national cemeteries abutted, and that the appropriation for the maintenance and improvement of national cemeteries was not available for the construction of the proposed improvements.

(80-412.2, J. A. G., May 11 and 26, 1914.)

LIVING EXPENSES: Headquarters' clerk on temporary duty; flat or commuted rate for living expenses.

A headquarter's clerk submitted an itemized bill amounting to \$31 to the Auditor for the War Department for reimbursement for his living expenses while on temporary duty with the headquarters of the second division at Texas City, Tex., the same being the full amount allowed by Army regulation for such expenses for the period covered by the claim. On submission of the question as to whether or not a regulation could be made which would authorize reimbursement for these expenses at a flat or fixed rate contingent only upon the performance of duty under competent orders,

Held, that as the pay of this clerk as well as that of all other clerks covered by the appropriation for headquarters of divisions, etc., was fixed by law, the same could not be increased or decreased by any regulation of the department, and that it would not be competent to prescribe a flat rate of reimbursement by way of commutation of actual expenses contingent only upon the performance of duty under competent orders without legislation authorizing the same.

'16-020, J. A. G., May 6, 1914.)

MEDICAL CORPS: Reserve officers of the Organized Militia belonging to.

A first lieutenant in the Medical Corps of the organized militia of Maryland was also a member of the Reserve Corps of the Army, and was about to receive orders in the latter capacity to proceed to Texas City, Tex., for active duty with the United States Army. At the time he was on leave from service with the militia attending the Army Medical School at Fort Leavenworth, Kans. Section 8 of

the act of April 23, 1908 (35 Stat., 68), provided that in emergencies the Secretary of War might order officers of the Medical Reserve Corps to active duty in the service of the United States, subject to certain provisions which did not preclude service with the militia or with the volunteer troops of the United States or any service with the United States in any other capacity, but said act also provided that—

“when so serving with the militia or with volunteer troops, or when employed in the service of the United States in any other capacity, an officer of the Medical Reserve Corps shall not be subject to call for duty under the terms of this section.”

Held, that the statute was intended to permit officers of the Medical Reserve Corps not designated for active duty to serve with the militia of the State while under the jurisdiction of the State as well as when called into active service of the United States, and that the officer should be regarded as serving with the militia when his relation to the militia is such that he is subject to orders as an officer of the same for any militia duty pertaining to his office therein, and that while this relation of service continued he was ineligible for designation on active duty with the Medical Corps of the Army; *but held further*, that if granted a leave of absence for the purpose of accepting active duty as a member of the Medical Reserve Corps, he would, during such period of absence, be eligible to be called into active service, as specified in said act of April 23, 1908.

(6-227.4, J. A. G., May 19, 1914.)

NURSES: Longevity pay; credit for service as contract nurses.

A nurse in the Hospital Corps of the Army had, previous to her appointment as such, served a period with the Army as a contract nurse, during which time she was enrolled by the American Red Cross to assist the Army Nurse Corps in emergencies.

The act of March 23, 1910 (36 Stat., 249), provided that female nurses of the Nurse Corps should receive—

“fifty dollars per month for the first period of three years’ service; fifty-five dollars per month for the second period of three years’ service; sixty dollars per month for the third period of three years’ service; and sixty-five dollars per month after nine years’ service in said Nurse Corps.”

Held, that the service required to make up the three-year periods for purposes of pay must be service in the Nurse Corps, and that the prior service as contract nurse could not be counted in making up the three-year periods for the purpose of computing this nurse’s pay.

(6-227.2, J. A. G., May 14, 1914.)

NURSES: Payment of reserve called into actual service; exceeding amount appropriated for; pay of Army as one fund.

Section 19 of the act of February 2, 1901 (31 Stat., 753), provided that—

“The Nurse Corps (female) shall consist of one superintendent * * * and of as many chief nurses, nurses, and reserve nurses as may be needed.”

The act of March 2, 1913 (37 Stat., 708), appropriated for the fiscal year 1914 "for one hundred and fifty nurses (female), \$106,030," and the act of April 27, 1914 (Pub. No. 91, 63d Cong., p. 6), appropriated for the fiscal year 1915 a like amount for pay of "nurses (female)" without specifying any number, which amount was only sufficient to pay the 150 nurses at the rates authorized by law. Both acts contained a provision that all money appropriated for the "Pay of the Army" and "Miscellaneous," except the mileage appropriation, "shall be disbursed and accounted for by officers of the Quartermaster Corps as pay of the Army, and for that purpose shall constitute one fund."

Held, that as appropriation was made for the fiscal year 1914 for only 150 nurses, that number could not be exceeded, and that under the terms of the law, reserve nurses if called into active service in excess of the number appropriated for during said fiscal year, could not be paid from the appropriation for the "Pay of the Army."

Held further, that the effect of the proviso regarding the use of the appropriations under the heads of "Pay of the Army" and "Miscellaneous," as one fund, was to permit the use of balances of items under said appropriations to supplement items that might be deficient (3 Comp. Dec. 604), and as no limit was placed upon the number of nurses by the act of April 27, 1914, *supra*, the appropriation for nurses might be supplemented by unused balances of items under said general heads of appropriation should said appropriation prove insufficient by reason of the employment of additional nurses. (5-241, J. A. G., May 16 and 29, 1914.)

RETIRED OFFICERS: Assignment to staff duty; command and service with troops.

Section 1255, Revised Statutes, provided that—

"Officers retired from active service shall be withdrawn from command * * *

and the act of April 23, 1904 (33 Stat., 264), provided that—

"The Secretary of War may assign retired officers of the Army, with their consent, to active duty in recruiting * * * and to staff duties not involving service with troops; and such officers while so assigned shall receive the full pay and allowances of their respective grades."

The question having been presented as to whether retired officers could be utilized for duty as acting quartermasters at military posts from which the garrisons had been temporarily withdrawn, but leaving at each post a detachment of enlisted men of the Quartermaster Corps.

Held, that said Section 1255, Revised Statutes, withdrew retired officers from command, and that as a certain number of enlisted men of the Quartermaster Corps was to be left at each post, it was clear that the service contemplated would involve a command, and would also be service with troops. *Held further*, that the services of retired officers could not be thus availed of.

(88-600, J. A. G., May 4, 1914.)

TAXATION: Personal tax and jury duty; soldiers in the reserve.

Information was desired as to whether, under the recent legislation increasing the enlistment period in the Army to seven years, the last four of which should be in the reserve, a soldier, during the reserve period, was exempt from poll and road tax and from jury duty.

Held, that the status of soldiers of the reserve, so far as respects the matter under consideration, was similar to that of retired officers; that while the status continued they had no active duty to perform which would render a taxation on their polls or the requirement of jury duty an interference with their relation to the Federal Government; and that during such period they were liable for such tax and duty, except in so far as the laws of the particular State where they might reside should otherwise provide.

(90-143, J. A. G., May 12, 1914.)

TRANSPORTATION: Cost of, where articles were purchased for a particular use.

Certain fencing material was procured abroad for use of the Mounted Service School at Fort Riley, Kans., and shipped from New York, N. Y., to said fort on a bill of lading which indicated that the freight charges were to be paid from funds of the Mounted Service School.

Held, that the freight charges should be regarded as a part of the cost of procuring the material, and so payable from the appropriation covering the purchase, and not from the appropriation for the transportation of the Army and its supplies; but that it would have been otherwise if the property had been purchased and delivered for general uses of the Army and afterwards transported as military stores to the place where needed. See Opinion July 21, 1905 (Dig. Op., J. A. G., 1912, p. 44).

(5-213, J. A. G., May 6, 1914.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the Office of the Judge Advocate General.)

DAMAGES: Liquidated; measure of damages after supplemental contract.

A contract was entered into to furnish and deliver at the place of manufacture certain generator sets, converters, transformers, and a voltage regulator at prices set opposite each item. The contract provided that each completed article before acceptance should be submitted at the factory to a test to show its compliance with the specifications and capability of performing the work for which it was intended. The contractor was obligated to make "complete delivery of all items covered by his contract * * * within 150 days after notification" of the approval of his contract by the Chief of Engineers. It was recited that time should be considered "as an essential feature of this contract," and it was agreed that as the amount of damages for delay beyond the time limit, exclusive of expenses of inspection and superintendence, was "difficult, if not impossible, of

definite ascertainment and proof," the amount of such damages should be liquidated and agreed as \$25 for each day's delay beyond said time limit.

Some time after the date fixed for the completion of deliveries a certain part of the machinery was submitted for, but failed to meet, the test required by the specifications. The defects were waived in writing in the interests of the Government and in accordance with the contract, and the machinery was accepted. A supplemental contract was then made providing for the shipment of the machinery so accepted and for payment therefor at contract rates less 10 per cent retained and liquidated damages to the date of the supplemental contract. Thereafter complete delivery was made, and it was proposed, on final settlement, to pay the 10 per cent retained without further deduction for liquidated damages.

Held, that the agreed measure of damages for delay in delivery contemplated damages for the whole lot of the machinery, and that the contract fixed no measure of damages upon any other basis or for any other kind of delivery than the delivery of all the machinery; that the amount specified for liquidated damages could not represent damages resulting from a delay in delivery of a part of the machinery unless all the machinery was part of one unit and incapable of separate use; that inasmuch as all but a small part of the machinery was delivered at the date of the supplemental contract, the measure of damages so fixed could have no application to delay after that date; and that when any of the machinery was delivered, accepted and used by the Government, the measure of damages, figured on the basis of a delay in delivery of the whole lot, had no application to delays in the delivery of the remaining items, as to which items the contract fixed no measure of damages, liquidated or otherwise. *Held*, therefore, that the contractor be paid without deduction for liquidated damages after the supplemental contract, but retaining the estimated amount of actual damages.

(Comp. Geo. E. Downey, May 5, 1914.)

HEAT AND LIGHT: For quarters occupied by officers and a civilian; division of benefits.

Two officers of the Army were on duty at Kansas City, Mo., under competent orders entitling them to commutation of quarters. They occupied a residence containing seven rooms with its own individual heating plant, and the gas and electric current consumed for light were registered by separate meters. A civilian shared in the occupancy of a part of the quarters, paying a part of the living expenses and receiving equal benefits from the electric light furnished for the house. A bill was presented by a local company for electric-light current furnished for the entire building.

Held, that there was no authority for conferring benefits upon civilians through payments authorized by the Government for the benefit of Army officers; that the voucher, being an entirety covering light furnished for all the rooms, could not be paid without the

certainty of paying for some service for the benefit of a civilian, and, as the latter benefit could not be separated, payment of the voucher as presented was not authorized; but that if a separate voucher were presented for such service for rooms occupied exclusively by the officers, payment therefor might properly be made.

(Comp. Geo. E. Downey, May 8, 1914.)

QUARTERS: On Army transport; commutation; change of orders *nunc pro tunc*.

An officer was, by competent orders, relieved from assignment to his company, placed on the unassigned list, and directed to "proceed to Galveston, Tex., for duty on the transport indicated" in his orders. After having entered upon the duty in pursuance of these orders the officer requested that the same be amended so that he would be allowed commutation of quarters and light and heat, and said orders were accordingly amended by the War Department so as to show that he was relieved from his company and placed on the unassigned list, and further made to read as follows:

"Will proceed to Galveston, Tex., take station at that place, and report in person to the depot quartermaster in charge of the Army transport service at that place for assignment to duty."

It did not appear that the amended order made any change in the duty status of the officer, and when the amendment was made he had already proceeded to Galveston and taken station on the transport to which he had been assigned by the prior order.

Held, that the orders could not change the officer's status so as to affect his pay and allowances simply by declaring the nature of the service, but that the facts constituting the service were controlling, and the conditions could not by orders be made otherwise than what they were in fact; that the transport remained in the harbor at Galveston, or the further fact that his family was not permitted to occupy quarters with him on board, was not material; and that the claim for commutation should be disallowed. 20 Comp. Dec., 264.

(Comp. Geo. E. Downey, May 11, 1914.)

RAILROADS: Government-aided; land-grant deduction from extra fares on special trains.

An officer of the Army travelled over land-grant railroads from Seattle, Wash., to San Francisco, Cal., on a special train for which an extra charge of \$5 was made. The Auditor for the War Department, in making settlement, deducted from this extra charge on account of land grant.

Held, that the transportation to be furnished to the United States under the terms of the act making the land grant was not limited to service on any particular train, and that the extra fare for transportation upon the train by which the officer traveled was a part of the regular fare or charge for transportation and subject to the land-grant deduction.

(Comp. Geo. E. Downey, May 21, 1914.)

TAXATION: Of Government agencies; fee for inspecting mount of an officer transported by the Government.

A horse belonging to a retired Army officer was in transit at Government expense from Fort Laredo, Tex., to Mobile, Ala., the officer's home. At New Orleans, La., the horse was inspected by a State official and a fee of \$5 charged therefor, which the railroad company furnishing the transportation paid. The inspection was considered necessary under State laws, because the animal was not accompanied by a proper health certificate. The horse was the private mount of the officer, who was proceeding home under orders after his retirement. On claim for reimbursement of the amount paid as inspection fee—

Held, that the horse was to all intents and purposes Government property for transportation; that it would not be reasonable or proper that any State official should interfere with the movements of the Army by requiring an inspection of animals shipped by the Government through its territory; that the inspection fee, if a proper charge at all, was a charge against the United States; and that the right of the State to levy such a charge could not be recognized. 2 Comp. Dec., 375.

(Comp. Geo. E. Downey, May 8, 1914.)

TELEGRAPH SERVICE: Charges for; night and lettergram rates.

The Postal Telegraph-Cable Co. presented a voucher representing the difference between the night lettergram rate and the rate for night messages on two telegrams sent from points in the United States to the United States Immigration Service at Vancouver, British Columbia, and Montreal, Canada, respectively. These telegrams were marked by the sending officers as "night lettergrams," for which form of message the charge was cheaper when the messages approached 50 words or more than the ordinary night-message rate, but owing to the small number of words in these messages the night rate would have been less than the lettergram rate.

Held, that the mistake of the sending officers in wrongly designating the type of message did not change the character of the service actually rendered and did not entitle the sending company to charge an excessive rate for the messages as sent nor to charge an amount in excess of the rate for night messages; that the mistake in designation did not affect the charges of the connecting carrier, the Canadian Telegraph Co., as the rates of that company were alike for night messages and lettergrams; and that the sole result of the mistake was to cause charges to be erroneously entered on the books, for which mistake the transmitting company was as much responsible as the sending officers.

(Comp. Geo. E. Downey, Apr. 22, 1914.)

TRANSPORTATION: Hire of automobile for officer traveling on a mileage status.

A recruiting officer of the Army was directed to travel under orders entitling him to mileage from Memphis, Tenn., to Pittsburg Landing, Tenn. A portion of the journey was made by rail, but no such

accommodation being available for the remainder of the journey he hired an automobile for the purpose.

The mileage law of January 12, 1906 (34 Stat., 246), in force at the time, provided that officers of the Army traveling under competent orders without troops should be paid 7 cents per mile, and no more, but that they might apply to the Quartermaster Department for a transportation request for the journey, and if the same were furnished it should be charged against their mileage accounts at the rate of 3 cents per mile for the transportation furnished. The Army appropriation act of March 2, 1913 (37 Stat., 716), under the head of "Transportation of the Army and its supplies," contained the following provision:

"For the purchase, hire, operation, maintenance, and repair of such harness, wagons, carts, drays, and other vehicles as are required for the transportation of troops and supplies, and for official, military, and garrison purposes;"

Held, that the mileage law was not repealed by the above appropriation act, that said law fixed the full measure of allowance to officers traveling on a mileage status, and that the officer could not refuse mileage and demand reimbursement for the hire of special means of transportation. 17 Comp. Dec., 204. Whether the Quartermaster Department could furnish an officer special means of transportation and pay for the same out of the appropriation for the transportation of the Army and its supplies, charging him 3 cents a mile for the distance, was not involved in the submission, and was not decided.

(Compt. Geo. E. Downey, Dec. 16, 1913.)

DECISIONS OF THE COURTS.

(Digests prepared in the office of the Judge Advocate General.)

CONTRACTS: Damages occasioned by misstatement in specifications; warranty.

A contract for the repair of a dam called for the excavation of material immediately above it. The specifications attached to the contract stated that the dam was "backed up for about 50 feet with broken stone, sawdust, and sediment to a height within 2 or 3 feet of the crest," and that bidders were expected to visit the locality of the work, make their own estimates of the facilities and difficulties attending the execution of the proposed contract and obtain information necessary to make intelligent proposals. As the work proceeded it developed that the space above the dam was occupied, not as stated in the specifications, but partly by soft slushy sediment and partly by cribwork consisting of sound logs filled with stones. Suit was brought for damages suffered by the contractors which would not have occurred had the dam been backed with the material stated in the specifications.

Held, that the positive statement in the specifications regarding the character of material back of the dam must be taken as true and binding upon the Government, which must sustain the loss resulting from the mistaken representation rather than the contractors, who had a right to rely upon the representation in the specifications with-

out an investigation to prove its falsity, and that judgment should be entered for damages incurred because of the difference in character of material found back of the dam from that described in the specifications. Reversing the same case in 47 Court of Claims, 236 (W. D. Bul. No. 12, 1912, p. 18).

(*Hollerbach & May v. United States*, U. S. Supreme Court, Apr. 6, 1914.)

COURTS-MARTIAL: Jurisdiction of civil courts; correction of errors.

A petty officer of the Navy was tried and convicted by a naval court-martial on charges of scandalous conduct tending to the destruction of good morals, and was sentenced to three years' imprisonment to be followed by dishonorable discharge with forfeiture of pay. The sentence was duly approved by the Secretary of the Navy. A petition for a writ of *habeas corpus* was presented alleging, as the only ground, that the judge advocate of the court-martial was allowed to be present for a short time during a closed session of the court, contrary to section 2 of the act of July 27, 1892 (27 Stat., 277).

Held, that civil courts are in no sense appellate tribunals for the revision of the procedure of courts-martial, and will not interfere with the judgment of such a court if it appears that it had jurisdiction of the person and of the subject matter before it; and that errors of procedure in military records can be corrected only by the proper military authorities. *Held further*, that the statute, the violation of which was complained of, related to procedure and not to jurisdiction, and that its nonobservance was a matter for revision by military authority and not for revision by the civil courts. The writ was, therefore, denied.

(*Ex-parte Tucker*, U. S. District Court, Jan. 21, 1913, 212 Fed. Rep., 569.)

MILITIA: Transportation of the organized, to and from joint encampment; land-grant deduction for transportation of troops of the United States Army.

A land-grant-aided railroad transported, on Government request, members of the organized militia of the States of Alabama and Mississippi from points in said respective States to and from Macon, Ga., for the purpose of their participating in the joint maneuver encampment with a portion of the Regular Army, pursuant to section 15 of the act of January 21, 1903, as amended by section 9 of the act of May 27, 1908 (35 Stat., 402). The Auditor allowed the claim for transportation service at the usual rates, but deducted for land grant on the theory that the said militia were troops of the United States. The railroad company sued for the amount thus withheld.

Section 15 of the said act of January 21, 1903, as amended, provided for the participation of the organized militia of any state at the request of the governor thereof in the encampment maneuvers and field instruction of any part of the Regular Army, and provided also for their pay, subsistence, and transportation. It further provided that the command of the post or camp should remain in the regular commander of the post, without regard to the rank of the militia officers temporarily encamped thereat.

Held, that the organized militia of the several states do not become troops of the United States in the meaning of the land-grant acts until called into the service of the United States pursuant to the Constitution; that the President did not call forth the said militia for the encampment mentioned, and he was not their commander in chief while they were there; and that, not being troops of the United States, the railroad company was entitled to full fares for their transportation without land-grant deduction.

(*Alabama, etc., R. R. Co. v. U. S.*, Ct. of Cls., May 18, 1914, No. 31872.)

PARDON: Before conviction; effect of refusal to testify after pardon.

The city editor and a reporter of a New York newspaper refused to answer questions before a grand jury concerning the sources of their information which were made the bases of certain articles published in said newspaper regarding customs frauds, on the ground that the disclosure would tend to incriminate them. Later the President issued full pardons to both of them, covering any possible crime which might be connected with said matter. They refused to accept this pardon and persisted in their refusal to answer. The grand jury thereupon presented them for contempt.

Held, that the President might pardon anyone who had never been charged with or convicted of a crime, and the person pardoned would be thereby deprived of the right to claim the privilege that his testimony regarding such crime might incriminate him, without reference to whether he accepted the pardon or not. *Held further*, that the respondents in refusing to answer the questions concerning the sources of their information after such pardon, were guilty of contempt, and they were fined accordingly.

(*U. S. v. Burdick, et al.*, U. S. Dist. Ct., 211 Fed., 492.)

PAY OF THE ARMY: Increase for service outside the United States and contiguous territories; service in Porto Rico.

The act of June 30, 1902 (32 Stat., 512), provided—

“That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto.”

The act of June 12, 1906 (34 Stat., 247), appropriated for said increase for officers for the fiscal year 1907 but excepted Porto Rico and Hawaii. The act of March 2, 1907 (34 Stat., 1164), appropriating for the fiscal year 1908, contained a similar appropriation and exception.

The act of May 11, 1908 (35 Stat., 110), provided—

“That increase of pay for service beyond the limits of the States comprising the Union, and the Territories of the United States contiguous thereto, shall be as now provided by law”—
and proceeded to appropriate (p. 114):

"For additional ten per centum increase on pay of officers on foreign service."

An officer of the Marine Corps sailed from New York June 27, 1908, under orders, for duty in Porto Rico with station at San Juan, and served there until November 3, 1909, when he was detached and ordered back to the United States, arriving there four days later. The pay of the officers of the Marine Corps is fixed by section 1612, Revised Statutes, at the same as officers of like grade in the Infantry of the Army. This officer sued in the Court of Claims for \$209.78, being 10 per cent of his regular pay, for service in Porto Rico during the period in question.

Held, that the provision in the act of June 12, 1906, appropriating for the Army for the fiscal year 1907, and in the act making similar appropriations for the fiscal year following, excepting Porto Rico and Hawaii from the appropriation for 10 per cent increase of pay for officers serving therein, was temporary legislation, was not intended to affect permanently the act of June 30, 1902, and did nothing more than to suspend temporarily said act as to Porto Rico and Hawaii; and that the plaintiff was entitled to recover the increase claimed.

(*U. S. v. Vulte*, U. S. Supt. Ct., May 4, 1914, 233 U. S., 509.)

BULLETIN 33.

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No. 33. }

WAR DEPARTMENT,
WASHINGTON, July 28, 1914.

The following digest of opinions of the Judge Advocate General of the Army for the month of June, 1914, and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2094269 H—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

W. W. WOTHERSPOON,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ABSENCE: Of officers and enlisted men of the Army due to misconduct; stoppage of pay; United States Military Academy detachments.

The Army appropriation act of April 27, 1914 (Pub. No. 91, 63d Cong., p. 4), provided:

"That hereafter no officer or enlisted man in active service who shall be absent from duty on account of disease resulting from his own intemperate use of drugs or alcoholic liquors or other misconduct shall receive pay for the period of such absence, the time so absent and the cause thereof to be ascertained under such procedure and regulations as may be prescribed by the Secretary of War."

Held, that said legislation was clearly applicable to all officers and enlisted men of the Army in active service, and therefore was applicable to members of the United States Military Academy detachment at West Point, New York.

(72-210, J. A. G., June 25, 1914.)

APPROPRIATIONS: Specific and general; Engineer School at Washington Barracks, D. C.

The quartermaster at Washington Barracks, D. C., had expended money from appropriations of the Quartermaster Corps for repairs on account of the Engineer School buildings and for fuel and light on account of such buildings and plant. The greater portion of these expenditures was for heating the school building, for operating the school power house, and for the engineer steamer *Pontonier*, which had been principally used in transporting troops and supplies. The

appropriation for the Engineer School for the fiscal year concerned in the act of Mar. 2, 1913 (37 Stat., 719), provided for the—

“Equipment and maintenance of the Engineer School at Washington Barracks, District of Columbia, * * * incidental expenses of the school, including fuel, lights, chemicals, stationery, hardware, machinery, and boats, * * * for repairs of and materials to repair public buildings and machinery.”

Held, that said appropriation was more specific for the purposes indicated than the general appropriations of the Quartermaster Corps for similar purposes, and must be used to the exclusion of the latter.

(5-262, J. A. G., June 10, 1914.)

DESERTERS: Rewards for, when delivered to the military authorities, but not accepted.

Two deserters were arrested by the sheriff of Pike County, Ark., and turned over to the military authorities at Fort Logan H. Roots in said state. The quartermaster sergeant in charge of the post at the time refused to receive the prisoners, as he had no means of guarding or feeding them, and advised the sheriff to report to the recruiting officer at Little Rock, Ark., and to telegraph to the commanding general, Eastern Department, for instructions. He telegraphed as advised, but before receiving a reply released the prisoners and returned to his home. Circulars had been issued offering the usual reward of \$50 for the arrest and delivery of either of the deserters in question at a military post.

Held, that the sheriff in arresting and delivering the prisoners to the authorities at the military post, had complied with the terms of the offer and was entitled to the reward, notwithstanding that the prisoners were not accepted by such authorities and were afterwards released.

(26-200, J. A. G., June 22, 1914.)

DETACHED SERVICE: Status of officer, when statute relating to, is inoperative.

The act of August 24, 1912 (37 Stat., 571), provided:

“That hereafter in time of peace whenever any officer holding a permanent commission in the line of the Army with rank below that of major shall not have been actually present for duty for at least two of the last preceding six years with a troop, battery, or company of that branch of the Army in which he shall hold said commission, such officer shall not be detached nor permitted to remain detached from such troop, battery, or company for duty of any kind.”

Held, that this statute was applicable only in time of peace, but that when once operative it applied to the last preceding six years and required that an officer to be eligible for detached service should have been present for duty with his organization as prescribed for at least two of such six-year period, regardless of whether any part of that period was in time other than peace when the law itself might be suspended.

(6-124, J. A. G., June 9, 1914.)

DETACHED SERVICE: Duty as adjutant of a brigade performed by a captain or by a field officer not detailed in The Adjutant General's Department.

The army appropriation act of April 27, 1914 (Pub. No. 91, 63d Cong., p. 7), provided:

"That after September first, nineteen hundred and fourteen, in time of peace, whenever any officer holding a permanent commission in the line of the Army, with rank of colonel, lieutenant colonel, or major, shall not have been actually present for duty for at least two years of the last preceding six years with a command composed of not less than two troops, batteries, or companies of that branch of the Army in which he shall hold said commission, such officer shall not be detached nor permitted to remain detached from such command for duty of any kind except as hereinafter specifically provided: * * * *Provided further,* That whenever the service record of any field officer is to be ascertained for the purposes of this Act, all duty actually performed by him during the last preceding six years, in a grade below that of major, in connection with any statutory organization of that branch of the Army in which he shall hold a permanent commission, or as a staff officer of any coast-defense or coast-artillery district, shall be credited to him as actual presence for duty with a command composed as hereinbefore prescribed * * *"

Held, in response to specific inquiries submitted by the Chief of Staff, that when a field officer of the line "not detailed in The Adjutant General's Department" (so specified in the inquiry) performs the regular and normal duties of brigade adjutant, he is actually present for duty with that brigade and is therefore actually present for duty with a command composed of not less than two troops, batteries, or companies of that branch of the Army in which the officer holds his commission, provided, of course, the brigade be a brigade of his branch of the service. *Held further,* that since a brigade is a "statutory organization" and duty as a brigade adjutant is duty "in connection with" a statutory organization, it follows that duty actually performed by a captain as adjutant of a brigade of his branch of the service within the period fixed by the legislation must, in determining his eligibility for detached service as a field officer, be credited to him as actual presence for duty with a command composed as prescribed by law.

(6-124, J. A. G., June 18, 1914.)

DETACHED SERVICE: Exercising command when not present with company; two-company commands.

A major was in command of a two-company post, when one of the companies left the post for several days for the purpose of engaging in target practice, the officer remaining at the post. Opinion was desired as to whether it still constituted a two-company command, and, also, as to whether it would cease to be such if one company should leave for duty in another department for an indefinite period.

Held, that the company engaged in target practice was still under the officer's command, did not become integrated with another command, and the officer's command did not cease to be a two-company

command by reason of such absence. *Held further*, that the company which might leave for duty in another department for an indefinite period could not be regarded as still constituting a part of the command of the officer, and when the detached-service legislation was applicable the period when this officer commanded only one company would have to be regarded as duty other than duty with "a command composed of not less than two companies."

(6-124, J. A. G., June 18, 1914.)

EIGHT-HOUR LAWS: Contract for dredging; work on retaining bulkheads.

A contract provided for excavating in Flushing Bay, N. Y., and for depositing the material excavated behind bulkheads constructed in shallow water or at the water's edge, all embankments or bulkheads needed for confining or grading the material with necessary waste weirs to be provided by the contractor without assistance by the United States. The men employed in constructing the sod retaining walls of the bulkheads were not directly operating the dredge or regular excavating machinery or tools. The work was done prior to the commencement of dredging operations, no supervision was exercised over said work, and no inspector was deemed necessary until the dredge was ready to begin excavation.

Held, that such labor was not performed upon a public work of the United States and was not therefore covered by the act of August 1, 1892 (27 Stat., 340); but that, as the contractor was required to furnish his own disposal area, the work of constructing the bulkheads to retain the dredged material as required by the contract was, under the stipulations of the contract, work involved in the contract, and whether the same was done by the contractor or by a subcontractor, it fell within the provisions of the act of June 19, 1912 (37 Stat., 137), regarding the execution of public contracts involving the employment of laborers and mechanics.

(76-720, J. A. G., June 8, 1914.)

ENLISTED MEN: Of the Army Reserve; employment of, in the civil service.

The act of August 24, 1912 (37 Stat., 590), authorized the establishment of an Army Reserve consisting of enlisted men with a military status closely assimilated, in respect to nonliability for active service in time of peace, to that of retired noncommissioned officers and enlisted men created by the act of February 14, 1885 (23 Stat., 305).

Held, that the status of the Army Reserve, being analogous to that of retired noncommissioned officers and enlisted men, which latter might be employed in the civil service of the Government, enlisted men of the Army Reserve could likewise be so employed, both in the classified and unclassified civil service, under such regulations, examinations, and tests as might be prescribed by the Civil-Service Commission.

(16-110, J. A. G., June 20, 1914.)

ENLISTED MEN: Civil employment while on furlough.

An enlisted man requested a three months' furlough in order that he might accept a civil service position in the Post Office Department with a view of trying said position before purchasing his discharge.

Held, that an enlisted man on furlough might accept civil employment, and that there was no legal objection to the granting of the furlough as requested to enable the soldier to accept the position in the Post Office Department during such furlough. Dig. Op. J. A. G. 1912, p. 13 d. (2); *id.* p. 84 a (1).

(2-135, J. A. G., June 30, 1914.)

FURLOUGHS: Returning from; charging cost of transportation to soldier.

A soldier was granted a 90-day furlough for the purpose of enabling him to visit his home in St. Paul, Minn., and after the expiration of 48 days thereof he was ordered to rejoin his company because of orders directing said company to proceed to Vera Cruz, Mexico. To enable him to rejoin his company, he was furnished transportation by the depot quartermaster to Galveston, Tex., at a cost of \$45.85.

Held, that a soldier on furlough must, at the expiration thereof, return to his post or station at his own expense, and the obligation is the same whether the length of furlough is curtailed or not, and that the soldier should be charged with the cost of the return transportation provided for him, not to exceed the actual cost to the Government, considering the amount of land-grant deduction, if any, to which the United States was entitled.

(94-240, J. A. G., June 4, 1914.)

MARTIAL LAW: Responsibility for destruction of property during.

A private corporation in Colorado made claim for damages to its property caused, on May 27, 1914, by a fire alleged to have been of incendiary origin. It was claimed that the Federal authorities were in control of the situation at the time and had "assumed protection of all mining property." It did not appear that there was any negligence on the part of the troops in guarding the property in question.

Held, that where the Government acts in the preservation of order, it assumes no obligation to insure property which it attempts to protect, nor is there any contractual agreement between the property owners and the Government that the latter will be responsible for want of care on the part of the troops in protecting such property.

Held further, that the Government is not responsible for damages resulting from the negligence or tortious acts of its officers or agents, and that it was not responsible for the damages sustained in said case.

(18-451, J. A. G., June 18, 1914.)

MOUNTS: Transportation of, from place of purchase to officer's station; computation of cost.

A first lieutenant, Field Artillery, in August, 1913, changed station from Manila, P. I., to Schofield Barracks, Hawaii. He had never had a horse shipped for him to his station at Government expense.

While in the Philippines he purchased a mount but was compelled to sell it on changing station to Schofield Barracks because of an order of the Department of Agriculture prohibiting the landing of live stock or animals of any kind from the Philippine Islands at any port of the Hawaiian Islands. He desired to have a mount purchased by him in the United States shipped to him at Schofield Barracks at Government expense, pursuant to the provisions of the act of March 23, 1910 (36 Stat. 256), allowing the shipment at Government expense of owned animals of an officer, not exceeding the number authorized by law, from point of purchase to his station "when he would have been entitled to and did not have his authorized number of owned horses shipped upon his last change of station, and when the cost of shipment does not exceed that from his old to his new station."

Held, that the officer was entitled to have his mount shipped to him from the United States to his then present station at a cost not to exceed what it would have cost the Government to have shipped a mount for the officer from his station in the Philippine Islands to Schofield Barracks, and that as in such case the shipment would have been effected by Government transport the cost of shipment should not exceed the cost of shipping an animal on a transport, but that in computing said amount the cost of subsistence and care of the animal on a transport would have to be taken into consideration. (94-022, J. A. G., June 3, 1914.)

NAVIGABLE WATERS: Obstructions to streams navigable in different States; disconnected navigable portions.

Section 9 of the act of March 3, 1899 (30 Stat., 1151), provided as follows:

"That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced."

The Susquehanna River contained a navigable portion from its mouth to some distance above lying wholly within the State of Maryland, and also several disconnected navigable portions lying within the State of Pennsylvania, but it may be that there was no navigable portion extending from one state to the other. Application was made to the Chief of Engineers and the Secretary of War for the approval of plans for the construction of a dam across that portion of the river lying within the State of Maryland, no authority for such construction having been granted by Congress.

Held, that the act of March 3, 1899, was not limited in its scope to interstate navigation, but operated on agencies and instrumentalities of interstate commerce, and its sole object was the preservation and protection of the navigability of these instrumentalities (*United States v. Rio Grande, etc., Co.*, 174 U. S., 690; *St. Anthony's W. P. Co. v. Water Comm'rs*, 168 U. S., 349; *The Montello*, 20 Wall., 430); that the distinction made in the statute was between rivers whose navigable portions lie entirely within a single state and those whose navigable portions lie within more than one state, which distinction did not rest upon the fact that in the one case there could not be, and in the other there might be interstate navigation thereon; and that the Susquehanna River having navigable portions in more than one state did not come within the proviso relative to rivers the navigable portions of which lie wholly within the limits of a single state, although there might be no interstate navigation. *Held further*, that the Secretary of War and Chief of Engineers were without authority to approve the plans for the construction of a dam across the Susquehanna River in Maryland until authority had been obtained from Congress. (62-020, J. A. G., June 8, 1914.)

NAVIGABLE WATERS: Rights of fishery and navigation; fishing nets as obstructions to navigation.

Section 10 of the act of March 3, 1899 (30 Stat., 1151), provided as follows:

"That the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is hereby prohibited; * * * and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

A notice had been issued by authority of the Secretary of War to those engaged in fishing in the waters near the mouth of the Columbia River, Oreg., calling attention to the foregoing provision and to the provisions of section 12 of said act prescribing punishment for violations thereof, and advising them that the operation of gill nets for taking fish within certain limits was considered as an unreasonable obstruction to navigation and prohibited by said law. It was shown that gill nets were sometimes half a mile in length and 30 feet or more in width, and constituted a menace to navigation from the liability of becoming entangled in the propellers of passing vessels or otherwise impeding their progress.

Held, that the right of navigation was superior to the right of fishery; that Congress by said act had assumed full jurisdiction over the navigable waters of the United States and had paramount authority over the same; that the act prevented obstructions not only to the navigable portions of the waters, but also to the navigable capacity as well; that the placing of such nets in the channel of the river constituted an obstruction to navigation within the prohibition of the

statute, which obstruction might be removed or abated; and that under the clauses of said section 10 succeeding the general prohibition therein, the Chief of Engineers and the Secretary of War might authorize the operation of seines which constitute obstructions to the navigable capacity of said river, but which, if not authorized, would be prohibited by the opening declaration of said section, said character of obstruction coming within the concluding language of said section.

(62-100, J. A. G., June 11, 1914.)

PURCHASES: Of supplies; advertising for purchase of an aeroplane; lack of competition.

The Chief Signal Officer of the Army desired authority "to hold a competition for the development of a suitable military aeroplane for service use, purchasing the machine making the highest points in the competition" for a certain price, the machine making the next highest number of points for a less price, and the machine making the next highest number of points for still less price. The appropriation for the Signal Service for the fiscal year 1915 authorized the expenditure of not more than \$250,000 for the purchase, maintenance, operation, and repair of air ships and other aerial machines, and placed no restriction upon the Secretary of War as to the method of procuring the same.

Held, that the object not being to procure aeroplanes of standard type, but to develop a suitable one for the military service, the case was one where it was impracticable to secure competition, and where the object could not be attained by advertising; that the statutes regarding advertising were inapplicable; and that no legal objection existed to the course proposed.

(5-231. J. A. G., June 11, 1914.)

QUARTERMASTER CORPS: Recommissioning officers of the constituent departments therein.

Section 3 of the act of August 24, 1912 (37 Stat., 591), provided as follows:

"The Quartermaster's, Subsistence, and Pay Departments of the Army are hereby consolidated into and shall hereafter be known as the Quartermaster Corps of the Army. The officers of said departments shall hereafter be known as officers of said corps and by the titles of the rank held by them therein * * *. The officers now holding commissions as officers of the said departments shall hereafter have the same tenure of commission in the Quartermaster Corps, and as officers of said corps shall have rank of the same grades and dates as that now held by them, and, for the purpose of filling vacancies among them, shall constitute one list, on which they shall be arranged according to rank."

An officer of the consolidated corps held a commission as assistant commissary general with rank of colonel.

Held, that Congress might change the rank and pay of an officer without making a new appointment necessary (*Wood v. United States*, 107 U. S., 414); that the statute effected the consolidation

without the necessity for the reappointment or recommissioning the officers of the respective departments as officers of the consolidated corps; and that there was no necessity for a new commission.

(6-224, J. A. G., June 13, 1914.)

SALES OF PROPERTY: By the Government to a civilian; sale of fuel.

The postmistress at Fort Meyer, Va., applied to the quartermaster at said post for the privilege of purchasing fuel for her personal use. Paragraph 1055, Army Regulations, 1913, provided for the sale of quartermaster stores to civilians employed with the Army "at remote posts or stations where it is impossible to procure at reasonable rates" the articles supplied.

Held, that as the fuel was intended for the personal use of the applicant, the sale could not be regarded as a sale from one department of the Government to another, and as the applicant was not a civilian employed with the Army at a remote station or post, the sale to her of fuel by the Quartermaster Corps would be unauthorized.

(80-132, J. A. G., June 3, 1914.)

TRANSPORTATION: Redemption of the unused portion of a ticket issued on a Government transportation request.

A discharged general prisoner applied to a railway company for a refund of the unused portion of a ticket given in exchange for a transportation request issued to him on his discharge, in accordance with the act of March 2, 1913 (37 Stat., 715). Transportation was furnished from New York to Chicago, Ill., but he had used the ticket only as far as Buffalo, N. Y.

Held, that the Government could claim no right to refund in respect of the unused portion of the ticket furnished the prisoner, and that the matter was one for arrangement between the railroad company and the holder of the unused portion of the ticket. 94-322, J. A. G., March 10, 1914.

(94-330, J. A. G., June 1, 1914.)

Similarly held with respect to the redemption of the unused portion of a ticket obtained on a transportation request issued to a rejected applicant for enlistment for his return to the station where he was accepted for enlistment.

(*Id.*, June 17, 1914.)

TRAVEL ALLOWANCES: Of soldiers on discharge; transportation to point within the continental limits of the United States.

A soldier enlisted in the Philippine Islands and was discharged at Fort McDowell, Cal., and decision was desired as to whether he could be furnished with transportation in kind and subsistence under the act of August 24, 1912 (37 Stat., 576), to Nome, Alaska. Said act provided that—

"when an enlisted man is discharged from the service, except by way of punishment for an offense, he shall be entitled to transportation in kind and subsistence from the place of his discharge to the

place of his enlistment, or to such other place within the continental limits of the United States as he may select, to which the distance is no greater than from the place of discharge to place of enlistment * * *."

Held, that the term "United States" is susceptible of a restricted or an enlarged meaning, depending on the context, and may be used as limited to the states comprising the Union or to include the organized states and the territories or dependencies of the same; that in the statute under consideration said term is qualified by the term "continental limits," which indicates that it is used in the larger sense; and that Alaska may be regarded as within the continental limits of the United States within the meaning of this statute.

(94-332, J. A. G., June 3, 1914.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

APPROPRIATIONS: Charging to a contractor cost of material furnished by the United States.

A contract provided for the construction for the United States of two storehouses at Fort Mason, Cal., the contractor to furnish all crushed rock required on the work. The Government, however, reserved the right of furnishing crushed rock used on the work at the rate of \$1.25 per cubic yard of rock so furnished, the amount to be deducted from the contract price.

Held, that the furnishing by the Government of crushed rock in pursuance of the contract was tantamount to a payment on the contract of \$1.25 for each cubic yard of rock furnished, and that the cost of labor and materials necessary to furnish the rock was payable from the appropriation for the project or work itself, notwithstanding that a considerable portion of the rock was furnished in a fiscal year other than that of the appropriation for the work under the contract.

(Comp. Geo. E. Downey, June 4, 1914.)

BARRACKS AND QUARTERS: Limitation on cost of construction of; use of appropriations.

Section 1136, Revised Statutes, provided that—

"Permanent barracks or quarters and buildings and structures of a permanent nature shall not be constructed unless detailed estimates shall have been previously submitted to Congress and approved by a special appropriation for the same except when constructed by the troops; and no such structures, the cost of which shall exceed twenty thousand dollars, shall be erected unless by special authority of Congress."

Appropriation was made by the act of April 27, 1914 (Pub. No. 91, p. 18), of a lump sum for the construction and repair of hospitals at military posts already established, and of general hospitals, and for additions needed to meet the requirements of increased garrisons.

It was proposed to expend from this appropriation \$20,000 for the completion of each of two hospitals, and the same amount for the erection of an addition to another. The sum of \$45,000 had been appropriated for the erection of one of the hospitals that was to be completed, and the amount had practically all been expended.

Held, in the case of the hospital for which the appropriation had been made, that no greater sum than the amount appropriated could be expended without congressional authority, and that as to the other two, the appropriation for the construction and repair of hospitals was not available for additions which would carry the cost of the buildings above the \$20,000 limit without further legislative direction.

(Comp. Geo. E. Downey, June 15, 1914.)

CONTRACTS: Charging cost of work voluntarily furnished by the Government.

A contract was entered into for the construction of a levee, with provision in the specifications that if in the opinion of the contracting officer operations under the contract were not being carried forward at a rate which would insure the completion of the work within the stipulated time, that officer might employ additional plant or labor and purchase such material as might be necessary to insure the proper completion of the work within the specified time, any excess of cost to be charged to the contractors. The work was not completed within the time limited, but the contractors were permitted to proceed with the work under an article in the agreement. Later it was feared that threatened floods might destroy the work already completed, and without request to the contractors to increase their force, and without any action annulling the contract, the Government hired additional teams to supplement the work.

Held, that the Government having voluntarily, without contract authority, assumed to do certain work, it was entitled to charge the contractors no more than the reasonable cost to it of doing the same, and that the contractors were entitled to settlement at full contract rates for all embankments placed, and to be charged only with the actual cost to the Government of the work done by the latter, without considering whether or not the contractors made a profit on account of such work.

(Comp. Geo. E. Downey, June 24, 1914.)

COURTS-MARTIAL: Jurisdiction of; sentence of forfeiture of pay; satisfying indebtedness to the Government and to a post exchange.

A retired sergeant major, United States Army, had been tried by court-martial for the larceny of certain funds belonging to the post exchange at the post where he was serving, while he was exchange steward. He was sentenced to forfeit \$50 per month of his pay for the period of one year, and thereafter to suffer a stoppage of a like amount per month to reimburse the post exchange until the sum of \$875 should be paid to said post exchange, that sum being the amount of his indebtedness on account of said larcenies.

Section 4818, Revised Statutes, provided:

"For the support of the Soldiers' Home the following funds are set apart, and are hereby appropriated: All stoppages or fines adjudged against soldiers by sentence of courts-martial, over and above any amount that may be due for the reimbursement of Government, or of individuals; * * *"

Held, that the stoppage of pay to reimburse the Government or a Government agency on account of losses for which officers and enlisted men are responsible, is purely an administrative matter with which courts-martial have nothing to do; that such part of the sentence as directed a stoppage of pay to reimburse the post exchange was unauthorized, and should be disregarded; and that the sentence should stand as though it read only for the forfeiture of \$50 per month for a period of one year. *Held further*, that a post exchange is an agency or instrumentality of the Government, and comes within the class of individuals mentioned in section 4818, Revised Statutes; that there was no pay against which the forfeiture could run until the indebtedness to the post exchange had been satisfied; and that when so satisfied the forfeiture or fine would begin to run against the soldier's pay and continue for the time specified, the amount as collected being appropriated to the Soldiers' Home.

(Comp. Geo. E. Downey, June 11, 1914.)

LEASING: Of quarters; form of contract for, by offer and acceptance.

It was proposed to make agreements in the form of a proposal and acceptance for the payment of the rent of quarters hired for occupancy by officers and enlisted men, also contracts for the transportation of troops, impedimenta, etc.

Section 3744, Revised Statutes, required, among other things, that contracts executed under the authority of the Secretary of War should be reduced to writing and signed by the contracting parties with their names at the end thereof.

Held, that it has been uniformly ruled by the courts that an agreement in the form of a proposal and acceptance was not such a contract as complied with the statute (*St. Louis Hay, etc., Co. v. United States*, 161 U. S., 159; *United States v. R. P. Andrews & Co.*, 207 U. S., 229); and that the use of the proposed form of agreement was not authorized. Dec. Sept. 11, 1912.

(Comp. Geo. E. Downey, June 11, 1914.)

PAY OF ENLISTED MEN: Of the Army; continuous service; reenlistment after completed enlistment and subsequent dishonorable discharge.

A soldier had served continuously as an enlisted man in the Marine Corps and in the Army, reenlisting after the termination of each period of enlistment by an honorable discharge from April 18, 1895, until September 5, 1913, when he was dishonorably discharged by sentence of general court-martial, with forfeiture of pay and allowances and imprisonment for three months. Before the expiration of his term of imprisonment he received permission to reenlist and

did so reenlist within three months after his dishonorable discharge. The act of May 11, 1908 (35 Stat., 109), provided—

“That hereafter any soldier honorably discharged at the termination of an enlistment period who reenlists within three months thereafter, shall be entitled to continuous service pay as herein provided, which shall be in addition to the initial pay provided for in this act * * *: *Provided*, That hereafter any soldier honorably discharged at the termination of his first or any succeeding enlistment period who reenlists after the expiration of three months shall be regarded as in his second enlistment; * * *.”

Held, that enlistments closed by honorable discharge become fixed and determined when the honorable discharge is given, and must remain so, and that it was not in the power of the court-martial to change them; that this soldier having been honorably discharged at the termination of a completed enlistment period sometime prior to his dishonorable discharge, the case fell within the provision of the statute relative to reenlistment after three months after an honorable discharge at the termination of an enlistment period; and that he should be carried as in his second enlistment. The decision in 14 Comp. Dec. 367 and 16 *id.* 871 were modified in accordance with the above decision.

(Comp. Geo. E. Downey, June 3, 1914.)

PAY OF ENLISTED MEN: Continuous service; application for reenlistment within time, but enlistment completed afterwards.

The act of May 11, 1904 (35 Stat., 109), provided that—

“Hereafter any soldier honorably discharged at the termination of an enlistment period who reenlists within three months thereafter shall be entitled to continuous-service pay as herein provided.”

A soldier had served two continuous enlistments, receiving an honorable discharge from each, the last being dated April 27, 1907. He applied for reenlistment before the expiration of three months, but on account of delays, apparently for the convenience of the Government, and without his fault, he was not finally reenlisted and sworn in until after the expiration of said period of three months.

Held, that he was entitled to have his reenlistment to take effect before the expiration of said three-month period, and was entitled to the benefit of his prior service in computing his pay for continuous service. *Coe v. U. S.*, 44 Ct. Cls., 419.

(Comp. Geo. E. Downey, June 16, 1914.)

PAYMENTS: For forage, stabling, and other services for mounts of military attachés abroad.

It had been the practice of officers of the Army on foreign service in France to pay for forage, stabling, horseshoeing, and veterinary services for their private mounts used in the service, afterwards procuring public bills to be made out and signed by the persons furnishing the service.

Held, that while this practice was contrary to the well-established rule that payment could be made only to the person rendering the

service, and that the claim of persons who voluntarily pay the Government's obligations can not be recognized, yet as these supplies and services were furnished by Frenchmen unfamiliar with our language, who did not understand our system of vouchers, and who held the officers themselves personally responsible for the service, officers incurring necessary and proper expenses for the purposes stated might be reimbursed upon vouchers properly executed, accompanied by subvouchers showing that the bills were actually paid by them, together with satisfactory certificates as to the necessity therefor.

(Comp. Geo. E. Downey, June 19, 1914.)

PURCHASES: Of envelopes for sale to officers and enlisted men of the Army.

The Auditor for the War Department disallowed items aggregating \$3.64, in the accounts of a quartermaster (the same being payments for envelopes purchased for military posts for sale to officers and enlisted men), on the ground that the purchases were not in accordance with the provisions of the act of June 26, 1906 (34 Stat., 476), which provided that after December 31, 1906:

"* * * the Postmaster General shall contract, for a period not exceeding four years, for all envelopes, stamped or otherwise, designed for sale to the public, or for use by the Post Office Department, the Postal Service, and other executive departments, and all Government bureaus and establishments, and the branches of the service coming under their jurisdiction, and may contract for them to be plain or with such printed matter as may be prescribed by the department making requisition therefor; * * *."

On appeal, the Comptroller of the Treasury affirmed the action of the auditor, and

Held, that the above quoted provision prohibited the purchase of envelopes by or for any Government department, bureau, or establishment, or any branch of the service coming under their jurisdiction, in any other manner than under contract made by the Postmaster General, except in case of exigency where the need for the envelopes was so urgent as not to permit of the delay necessarily incident to obtaining them through the Postmaster General. See 20 Comp. Dec., 34, and decisions therein cited.

(Comp. Geo. E. Downey, June 4, 1914.)

TRAVELING EXPENSES: Actual cost of subsistence.

The urgent deficiency act of April 6, 1914 (Pub. No. 82, 63d Cong., p. 7), provided that—

"On and after July first, nineteen hundred and fourteen, unless otherwise expressly provided by law, no officer or employee of the United States shall be allowed or paid any sum in excess of expenses actually incurred for subsistence while traveling on duty outside of the District of Columbia and away from his designated post of duty, nor any sum for such expenses actually incurred in excess of \$5 per day; nor shall any allowance or reimbursement for subsistence

be paid to any officer or employee in any branch of the public service of the United States in the District of Columbia unless absent from his designated post of duty outside of the District of Columbia, and then only for the period of time actually engaged in the discharge of official duties."

Held, that said legislation affected only expenses for subsistence; that railroad fare, Pullman charges, street care fare and cab hire, as well as tips to Pullman porters and cabin and deck stewards, were items of transportation, were not chargeable as a part of the cost of subsistence, and were not included in the maximum of \$5 per day allowed for expenses actually incurred for subsistence; and that the latter term included expenses of board and lodging and tips at hotels. (Comp. Geo. E. Downey, Apr. 22 and 24, 1914.)

BULLETIN 39.

BULLETIN }
No. 39. }

WAR DEPARTMENT,
WASHINGTON, August 18, 1914.

The following digest of opinions of the Judge Advocate General of the Army for the month of July, 1914, and of certain decisions of the courts, is published for the information of the service in general.

[2194536, A. G. O.]

By ORDER OF THE SECRETARY OF WAR:

W. W. WOTHERSPOON,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ABSENCE: On account of disease resulting from misconduct, or while in confinement; making good time lost.

The act of April 27, 1914 (Pub. No. 21, p. 3), provided:

"That an enlistment shall not be regarded as complete until the soldier shall have made good any time in excess of one day lost by unauthorized absences, or on account of disease resulting from his own intemperate use of drugs or alcoholic liquors or other misconduct, or while in confinement awaiting trial or disposition of his case if the trial results in conviction, or while in confinement under sentence."

A private soldier of the Quartermaster Corps who had enlisted before the passage of said act was absent from active duty on account of sickness resulting from his own misconduct from March 9 to 25 and from April 17 to May 1, 1914, all dates inclusive. He was being held beyond his period of enlistment to make good the time so lost.

Held, that said act had application only to enlistments entered into on or subsequent to its date and did not affect prior enlistments, except as to unauthorized absences in excess of one day, as to which the law only repeated existing legislation (Dig. Op. J. A. G., 1912, p. 16, B 9); and that the soldier should not be held to service to make up time lost through absences due to the causes mentioned occurring either before or after the passage of the act. *Held further*, that the law being permanent legislation took effect from its date and not from the beginning of the fiscal year for which appropriations were made therein.

(2-234, J. A. G., July 15, 1914.)

CONTRACTS: Supplemental; covering matter not included in the original contract.

Recommendation was made for the execution of a supplemental contract for the construction of walks, drains, etc., at an Army post. The original contract included a certain amount of paved ditch at a cost which the quartermaster deemed too high and also other side-walks, but not the one proposed to be constructed by the supplemental contract.

Held, that supplemental contracts should be made only in cases where obstacles or unforeseen conditions arise, or when the Government desires to abandon the whole or a part of its undertaking, and should also be made in the interest of the United States; that section 3709, Revised Statutes, required that all contracts be made after advertising; and that, as the walk proposed to be constructed was not included in the advertisement for the original contract but was a new piece of work, it did not come within the original advertisement and could not be regarded as an increase provided for in the then existing contract. *Held therefore*, that the substitution of the supplemental for the original contract could not be made.

(76-400, J. A. G., July 27, 1914.)

COURTS-MARTIAL: Combining separate offenses to make a greater offense.

A soldier was tried by general court-martial on two separate specifications, each charging larceny. In neither specification were the articles charged to have been stolen of sufficient value to constitute the offense of grand larceny under the local law, but the total value of all the articles stolen, as set forth in the two specifications, amounted to a sufficient sum to make an offense of grand larceny. Under the military practice the two offenses were tried together and one sentence imposed.

Held, that the several larcenies by the accused could not be aggregated for the purpose of making a case of grand larceny, if they were separate and distinct transactions; and that the prisoner should not be confined in the Federal penitentiary, but should be confined in the United States Military Prison at Fort Leavenworth, Kans.

(30-200, J. A. G., July 23, 1914.)

DETACHED SERVICE: Instructors at joint camps composed of regular troops and organized militia; service with troops in the field.

Opinion was desired as to whether officers of the Army ineligible for general detached service might be detailed for duty as instructors at joint camps composed of regular troops and organized militia for periods not to exceed, in each case, 60 days in any calendar year. The detached service legislation, which required a certain period of duty with a specified command to establish eligibility to be detached or to remain detached from such command for duty of any kind, was subject to exceptions, one of which was contained in the act of April 27, 1914 (Pub. No. 91, p. 8), reading as follows:

"That temporary duty of any kind hereafter performed with United States troops in the field for a period or periods the aggregate of which shall not exceed sixty days in any one calendar year,

* * * by any officer who, before assignment to such duty, shall have been regularly assigned to, and shall have entered upon duty with, an organization or a command the detachment of certain officers from which is prohibited by the act of Congress approved August 24, 1912, or by this act shall, for the purposes of said acts, hereafter be counted as actually present for duty with such organization or command."

Held, that a contingent of the Regular Army employed in the usual joint camps composed of regular troops and organized militia should be regarded as "troops in the field" within the meaning of the above provision; that officers performing duty with troops were not limited to the performance of any particular kind of duty in order to be brought within the special rule; and that officers detailed as instructors at such camp were serving with troops within the meaning of said provision, if they had been assigned to and entered upon duty with commands with which the general law required them to serve for a particular period and such assignment of duty status continued concurrently with such duty.

(6-124, J. A. G., July 6, 1914.)

DETACHED SERVICE: Service with troops; field officer performing duty as commanding officer and in other capacities, in connection with a Coast Artillery district; umpire at target practice.

The detached-service legislation established the general rule that a field officer of the line must have been actually present for duty for at least two of the last preceding six years with a command composed of not less than two troops, batteries, or companies of his branch of the service before he could be detached from such command for duty of any kind.

Held, that a Coast Artillery district was a command composed of not less than two companies of Coast Artillery in the sense of said legislation, and that a field officer of that branch of the service performing duty as commanding officer of a Coast Artillery district, or as adjutant or as matériel officer of such a district, should be considered as actually present for duty with such a command. *Held further*, that the duties of an umpire, as laid down in the regulations for target practice of the Coast Artillery Corps, were not organizational or functional duties pertaining to the district, were not inherent in the organization, and were not regular staff duties at all, and that the duties of such an umpire could not be held to be duty performed with troops in the field within the meaning of the provision in the act of April 27, 1914 (Pub. No. 91, p. 7), which allows temporary duty of any kind performed with United States troops in the field for periods not exceeding 60 days in any one calendar year to be counted as presence for duty with organizations or commands.

(6-124, J. A. G., July 10, 1914.)

EMPLOYEES: Of the United States; employment of foreigners in constructing improvements.

The question was raised as to whether the War Department could give a preference to Americans in the employment of skilled and unskilled laborers in making improvements at the Presidio, San Fran-

cisco, Cal. The constructing quartermaster at San Francisco had been hiring labor for the purpose, taking the employees, as far as possible, from the list of eligibles submitted by the local civil-service secretary, but in cases where no eligibles were furnished he employed the men who were the most suitable and the most available for the work, without regard to nationality.

Held, that the restriction suggested could not lawfully be imposed by the Secretary of War in the employment of labor for the purpose mentioned, but that the matter was peculiarly within the jurisdiction of the legislative department of the Government. See Dig. Ops., J. A. G., 1912, p. 373, XXXIII A.

(4-350, J. A. G., July 1, 1914.)

EMPLOYEES: Four-hour day on Saturdays; temporary employees.

The Executive order of June 9, 1914 (Bul. No. 26, W. D., 1914), prescribed that four hours should constitute a day's work on Saturdays from June 15 to September 15 of each year, until further notice, "for all clerks and other employees of the Federal Government, wherever employed." The question arose as to whether the order applied to per diem men and dock seamen employed in the transport service in San Francisco, Cal., for irregular periods.

Held, that the order should not be construed so as to include within its provisions men who are engaged and discharged from day to day, according as their services might or might not be required, but that it did include all who had an indefinite status whether their pay was measured by the day, by the month, or by the year, and that where such employees were required to work more than four hours on Saturdays within the period specified in the Executive order, it should be in pursuance of exceptions prescribed by the head of a department for public reasons.

(16-030, J. A. G., July 23, 1914.)

ENLISTED MEN: Of the Army; service in the volunteer forces or in the militia when called into the service of the United States.

Certain enlisted men of the Regular Army desired to accept commissions in the organized militia for service in the United States or in the volunteer forces of a state for like service. Upon consideration of their status should they desire to reenlist after such service—

Held—

1. That a soldier on the active list of the Regular Army could not accept a commission in the volunteer forces or in the militia in the service of the United States and retain his status as an enlisted man in the Regular Army; and that for such purpose he could not be placed on an indefinite furlough, but must be discharged from the Regular Army before accepting such commission.

2. That in the event of his discharge from the Regular Army for the purpose of enabling him to accept a commission in the volunteer forces or in the organized militia in the service of the United States, on his subsequent return to the ranks of the Regular Army as an enlisted man upon his muster out as a commissioned officer in such service, he would not be deprived of the right to continuous-service

pay earned by him before the acceptance of his commission, provided he reenlisted in the Regular Army within three months after his last discharge therefrom, exclusive of the time spent by him as such volunteer or militia officer.

3. That he would not be entitled to credit for his volunteer or militia commissioned service either for continuous-service pay purposes or for retirement.

(72-220. J. A. G., July 21, 1914—two cases.)

HEAT AND LIGHT: Heating of quarters, not public, occupied by officers and enlisted men on temporary duty.

Certain officers and enlisted men on temporary duty at Galveston, Tex., occupied quarters, not public, heated by separate heating and gas plants. It was assumed that they were not drawing any fuel allowance elsewhere, and that they were occupying said quarters by proper authority. Paragraph 1026, Army Regulations, 1913, as amended, so far as applicable, provided:

"Where an officer or enlisted man is occupying quarters other than public heated by a separate plant, the quartermaster will reimburse such officer or enlisted man for the fuel actually necessary for the rooms actually occupied, and not exceeding the number to which the rank of the officer or enlisted man entitles him, as specified in paragraph 1044, and in no case exceeding the maximum allowance set forth in the following table for the zones of equal temperature in which serving."

Held, that the officers and enlisted men could not be furnished with fuel in kind under the above regulation, but that they were entitled to be reimbursed for the fuel purchased by them actually necessary to heat the rooms actually occupied, not exceeding the number to which their rank entitled them, and not exceeding in cost the maximum allowance for the zone of temperature in which they were serving.

(72-313. J. A. G., July 28, 1914.)

MILITIA: Organized, engaging in joint encampments and maneuvers; cost of transportation of subsistence purchased for.

The organized militia of the State of Iowa was about to engage in a joint encampment and maneuver with a portion of the Regular Army, and application was made by the state authorities to purchase from the United States quartermaster at the camp subsistence stores of the Army for use of the state militia at said encampment.

Held, that subsistence stores might be supplied by the officers of the Army for the use of the organized militia at said joint encampment at cost price, with cost of transportation to the point of consumption added, and that such cost should be charged against the militia appropriations available for joint encampments.

(94-500, J. A. G., July 21, 1914.)

NOTE.—In an indorsement of August 4, 1914, in this case, it was held that the same rule applied to all subsistence stores furnished to organized militia at joint encampments.

NAVIGABLE WATERS: Obstructions to navigation; authorization by the President of physical connection with foreign territory.

Permission in general terms had been granted by the President to a telegraph-cable company to land, construct, maintain, and operate a cable connecting its foreign cables with San Juan, Porto Rico.

Held, that the power of the President to grant a physical connection with foreign territory, in the absence of a statute granting or refusing such permission, was a political one which he might exercise subject to the laws governing the subject matter; that the permission granted was subject to the laws of the United States for the protection of navigable waters; and that even if the President had given his consent to the establishment of the physical connection under such conditions as he saw fit, the structures proposed to be placed in the navigable waters of the United States could be so placed only in accordance with the laws governing the placing of structures in such navigable waters. *Held further*, that the company should be required to submit its plans and specifications and a map of the proposed location of its works, for approval as to the navigation interests involved. (62-390, J. A. G., July 6, 1914.)

PAY OF ENLISTED MEN: Continuous service; reenlistment after completed enlistment period and subsequent dishonorable discharge.

Attention is invited to the decision of the Comptroller of the Treasury of June 3, 1914 (Bul. No. 33, W. D., 1914, page 15), as affecting the provisions of paragraph III, General Orders No. 44, War Department, June 24, 1913, relating to the notation of enlistment periods upon descriptive and assignment cards and enlistment papers. In the said decision it was held that enlistments closed by honorable discharge became fixed and determined when the honorable discharge was given, and that upon reenlistment after three months after such honorable discharge, a soldier should be carried as in his second enlistment period, notwithstanding an intervening dishonorable discharge from another enlistment.

PUBLIC PROPERTY: Disposition of horse injured while in shipment; duty of common carrier; measure of damages.

A horse belonging to the Government was injured while in shipment in the hands of a common carrier so as to be useless for the public service. It was removed from the car at an intermediate station between the place of shipment and destination, and was afterwards sold by an agent of the carrier to a private party for much less than its former value. The horse had not been inspected and condemned nor ordered to be sold by any officer of the United States.

Held, that it was the duty of the common carrier in dealing with the property to act for the best interests of all concerned, and that as the carrier had attempted so to act and had assumed full responsibility for the loss, the sale might properly be ratified; and that the measure of damages was the value of the horse at the place of destination, less freight for shipment.

(80-010, J. A. G., July 8, 1914.)

RANK: Commissioned officers of same date of appointment; commissioned service in the Navy.

Four officers, graduates of the United States Naval Academy, were appointed second lieutenants in the Army and given rank according to the dates of their graduation and according to class standing as between two of them who had graduated on the same day.

Section 1219, Revised Statutes, provided:

"In fixing relative rank of officers of the same grade and date of appointment and commission, the time which each may have actually served as a commissioned officer of the United States, whether continuously or at different periods, should be taken into account. * * *"

Two of the officers had had previous commissioned service in the Navy which, if counted, would have changed the order of relative rank among them.

Held, that the statute did not include commissioned service in the Navy to be counted in determining the relative rank of officers of the same grade and date of appointment, and that the officers were not entitled to have the same counted in determining their relative rank. Dig. Opin., J. A. G., 1912, p. 966, A 2.

(82-211, J. A. G., July 23, 1914.)

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SOLDIERS: Disposition of remains of deceased; reward for recovery of bodies.

Two enlisted men of the Army had been drowned and rewards were offered for the recovery of their bodies. The bodies were recovered in pursuance of the offer and application made for the rewards. The sundry civil act of June 23, 1914 (38 Stat., 31), appropriated for the disposition of remains of officers and soldiers on the active list of the Army, including expense of interment of such remains and of their preparation and transportation to their homes or to national cemeteries.

Held, that the work of recovering the bodies was an incident to their proper interment and preparation and transportation, for which a reward might properly be offered, and that the rewards should be paid from the appropriation for the disposition of the remains of officers and soldiers.

(80-015, J. A. G., July 17, 1914.)

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SOLDIERS' HOME: Admissions to; ability of applicant to earn a living outside.

Two discharged soldiers of the United States Army were admitted into the Soldiers' Home, Washington, D. C., for temporary treatment for disabilities which had occasioned their discharge from the Army. They were relieved sufficiently to permit of their earning their living outside the Home, but their disabilities were such that they could not again be fitted for military service. Neither had served as much as 20 years in the Army when discharged.

Section 4821, Revised Statutes, defining the classes of persons entitled to the rights and benefits of the Soldiers' Home, prescribed as admissible thereto:

"Every soldier and every discharged soldier, whether Regular or Volunteer, who has suffered, or may suffer, by reason of disease or wounds incurred in the service and in the line of his duty, rendering him incapable of further military service, if such disability was not occasioned by his own misconduct."

Section 4823, *idem*, provided that:

"Any soldier admitted to the Soldiers' Home for disability who recovers his health so as to become fit again for military service, if under 50 years of age, shall be discharged."

Held, that the Soldiers' Home was an eleemosynary institution for the dispensing of charitable relief to the classes of persons described in the law as entitled to its benefits, which benefits included treatment for diseases or disabilities of soldiers and the furnishing of an asylum or home to the inmates, and, except as to treatment for disabilities of those subject to discharge when fit for military duty, the benefits of the institution, owing to its character, could be extended only to those in need of an asylum or home or in need of medical treatment and who were unable to provide the same for themselves. *Held therefore*, that the persons in question, being able to earn a living for themselves outside the institution, were properly denied permanent admission thereto.

(80-441.4, J. A. G., July 17, 1914.)

TRANSPORT SERVICE: Use of United States Army transports in conveying Chinese exhibits to the Panama-Pacific International Exposition at San Francisco.

A request was made by the commissioner and secretary of the Chinese Republic Commission for the use of a United States Army transport in conveying Chinese exhibits to the Panama-Pacific International Exposition, at San Francisco, Cal. These exhibits were the private property of Chinese merchants, and the request amounted to one for the use of Government transports in transporting private property.

The act of March 2, 1907 (34 Stat., 1170), contained the provision:

"That no part of this appropriation shall be applied to the payment of the expenses of using transports in any other Government work than the transportation of the Army, its supplies, and employees."

Held, that this provision, in view of the context, has been regarded as permanent legislation and as restricting the use of Government transports to the purposes stated therein, with certain exceptions expressly authorized by Congress; and that the effect of the statute for to prohibit the use of Army transports for the purpose requested.

(94-110, J. A. G., July 30, 1914.)

TRANSPORTATION: Settlement for unused portion of ticket furnished an Army nurse for transportation to her home.

A railroad company issued to an Army nurse a ticket in exchange for a transportation request given for her transportation from her duty station in San Francisco, Cal., to her home in Chicago, Ill., with

a view to her discharge. She traveled only as far as Ogden, Utah., having elected to remain at that place for purposes of her own.

Held, that there being no statute giving to an Army nurse the right of transportation in kind to her home on discharge, or mileage in lieu thereof, the travel performed in going to her home for discharge was travel as an employee of the United States, and that she had no right to any portion of the ticket which had not been used, but whatever rebate there was belonged to the Government.

(94-430, J. A. G., July 20, 1914.)

DECISIONS OF THE COURTS.

(Digests prepared in the office of the Judge Advocate General.)

CONTRACTS: Annulling for default of contractor and reletting; damages against the contractor.

A contract was entered into for dredging in San Pablo Bay, California, in which it was specifically provided that the spoil or waste from the dredging should be dumped behind bulkheads. On the ground that the contractor had failed to comply with the requirements of his contract, the Government proceeded under a paragraph in the contract to annul the same and to complete the work by means of another contract. In the advertisement for reletting the work the option was given to dump the spoil behind bulkheads as required in the original contract or to dump the same in deep water, and the contract was entered into on the basis of the latter alternative. Suit was brought by the United States to recover damages from the contractor and his sureties for failure to complete the work as contracted for.

Held, that the change in the location for dumping the material dredged was a material one and amounted to an important variation from the original contract so as to make it a different work from that which the original contractor was to perform, and that such contractor was not bound for the difference between the cost of the completed work under the original contract and the cost under the new contract.

(*United States v. Arman*, 234 U. S., 36, Mar. 9, 1914.)

PAY OF OFFICERS: During absence with leave; leave without pay.

An officer of the Army, having accepted employment with a commercial company, was granted six months' leave of absence which was afterwards extended four months. After the expiration of six months and during the extension of the leave he was notified that, by direction of the President, although his leave was not revoked, his absence would be without pay. The officer did not request leave without pay nor did he protest against the action of the President or relinquish his leave and return to duty.

Held, that the officer was entitled to pay during the period for which it was directed that his leave should be without pay, and judgment was rendered accordingly, reversing a prior decision of the court in the same case (47 Ct. Cls., 51).

(*Andrews v. United States*, Court of Claims No. 30785, Mar. 16, 1914.)

BULLETIN 43.

BULLETIN }
No. 43. }

WAR DEPARTMENT,
WASHINGTON, September 25, 1914.

The following digest of opinions of the Judge Advocate General of the Army for the month of August, 1914, including one for July, 1914, not heretofore published, and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2194536A, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

W. W. WOTHERSPOON,
Major General, Chief of Staff.

OFFICIAL:

H. P. McCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ABSENCE: On account of disease caused by misconduct; pay of enlisted men.

A recruit was convicted by summary court-martial of having whisky in his possession in company barracks and of being under the influence of liquor in said barracks, and was sentenced to 10 days' confinement with forfeiture of \$2 of his pay. He had enlisted subsequently to the act of April 27, 1914, which provided (Pub. No. 91, p. 3), that no enlisted man in the active service "who shall be absent from duty on account of disease resulting from his own intemperate use of drugs or alcoholic liquors, or other misconduct, shall receive pay for the period of such absence," and further, "that an enlistment shall not be regarded as complete until the soldier shall have made good any time in excess of one day lost" on said account.

Held, that the "other misconduct" mentioned in the statute was referred to as a cause of disease and not as a cause of absence, and that while the soldier would be required to make good any time lost in excess of one day while being held for trial or under punishment for drunkenness or for the other misconduct mentioned, such absence would not be attended with loss of pay under the statute.

(34-052, J. A. G., Aug. 20, 1914.)

AVIATION SERVICE: Act establishing an aviation section; repeal of statute.

The act of March 2, 1913 (37 Stat., 705), provided that the pay and allowances fixed by law for officers of the Regular Army should be increased by 35 per centum for officers detailed by the Secretary

of War for aviation duty, provided that such increase should be given only to such officers as were fliers of heavier-than-air craft and while so detailed. The act of July 18, 1914 (Pub. No. 143), provided for the organization within the Signal Corps of a section not to exceed 60 officers and 260 enlisted men, the officers to be detailed from the line of the Army below the grade of captain, for limited periods, the extra compensation provided for them being much greater than that provided in the act of March 2, 1913. This organization was charged with the duty of operating or supervising the operation of all military air craft, appliances and signaling apparatus appertaining thereto, and also with the duty of training officers and enlisted men in matters pertaining to military aviation. There was no provision in the later act specifically repealing the former.

Held, that the new law was not repugnant to the old, and there being no specific provision in the new act repealing the old, the act of March 2, 1913, remained in force and was in no way destroyed or diminished by the new legislation.

(6-228.1, J. A. G., July 30, 1914.)

CLERKS AND EMPLOYEES: Detail of; diversion of appropriations.

An officer of the Inspector General's Department desired the services of a stenographer while inspecting maneuver camps in Oregon, and the quartermaster at Portland, Oreg., offered the services of a stenographer from his office.

Held, that the detail of a clerk from the office of the quartermaster at Portland for duty with an inspector in making inspections of maneuver camps, would be a violation of section 3678, Revised Statutes, providing that—

"All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others"; but that there was no legal objection to the employment of said stenographer by the Inspector General's Department if the employment could be so arranged as not to conflict with his duties in the Quartermaster Corps.

(6-224, J. A. G., Aug. 6, 1914.)

CONTRACTS: Assignment of, to surety; payment to assignee.

A contractor, having become financially involved and unable to complete his contract, assigned the same, after a portion of the work had been performed, to the surety company on his contract bond, and executed a power of attorney to said company authorizing it to collect from the Government all amounts due and to become due for work done under the contract.

Held, that in view of the fact that the surety company had an equitable right to complete the work in default of the contractor and to have all moneys due applied to the discharge of the claims of labor and material men (*Richards Brick Co. v. Rothwell*, 18 App. Cases (D. C.), 516; *Marble Co. v. Burgdorf*, 13 *idem*, 506, 509), the assign-

ment was not within the prohibition of section 3477, Revised Statutes, forbidding the transfer of claims against the Government, or of section 3737, *idem*, prohibiting the assignment of Government contracts; and that, in view of the further fact that the assignee held a power of attorney from the contractor authorizing it to complete the work and to collect all moneys due, payment might be made to it, not only of all amounts due the contractor and unpaid, but also of amounts due for work performed by the surety company. Dig. Comp. Dec. 336.

(76-500, J. A. G., Aug. 10, 1914.)

EIGHT-HOUR LAW: Horse breakers and farm hands.

It was found necessary to increase the hours of labor to eight and one-half hours per day for certain horse breakers and members of the farm gang at the Fort Reno, Okla., remount depot, owing to the condition of work thereat and to the existence of a heavy corn crop which required to be cut and removed at once in order to avoid material loss to the Government. Section 1 of the act of March 3, 1913 (37 Stat., 726), limited the service and employment "of all laborers and mechanics" employed by the Government upon a public work of the United States, to eight hours in any one calendar day, and made it unlawful to require or permit such laborers or mechanics to work for a longer time except in cases of emergency.

Held, that said law did not apply to farmers or farm hands; that the horse breakers and the farm gang should be regarded as farm hands and not as laborers or mechanics within the meaning of the eight-hour statutes; and that they were, therefore, not subject to the restrictions of said statutes. Opin. J. A. G., Sept. 27, 1913.

(76-720, J. A. G., Aug. 29, 1914.)

EMPLOYEES: Of the Quartermaster and Medical Corps; issue of fuel in kind to; Army Regulations.

Paragraph 1044, Army Regulations, 1913, before amendment provided for a fuel allowance for "each employee of the Quartermaster Corps or Medical Corps to whom subsistence in kind is furnished by the Government." Changes Army Regulations, No. 7, June 11, 1914, in amending said regulation, omitted all provision for allowance of fuel in kind, including the allowance theretofore provided for civilian employees, but specified the number of rooms to which officers and enlisted men in quarters were entitled and the allowance of cooking and heating stoves supplied for their use, including also stoves for civilian employees.

Held, that there was no law which provided for a fuel allowance to civilian employees serving with the Army, and that they became entitled to the benefits of heat and light in quarters only by reason of the character of their service or their contracts of employment, and were not entitled thereto as a personal allowance.

Held further, that fuel might still be issued to such civilian employees as theretofore, although unprovided for by regulations.

(16-400, J. A. G., Aug. 18, 1914.)

HEAT AND LIGHT: Furnished to officers' quarters while on temporary duty with troops.

An officer on duty with troops at Laredo, Tex., with permanent station at Fort Thomas, Ky., occupied public quarters at Laredo suitable to his rank. He had closed his quarters at his permanent station. The act of February 27, 1893 (27 Stat., 478), provided that officers temporarily absent on duty in the field should not lose their right to quarters or commutation thereof at their permanent stations while so temporarily absent, and the act of March 2, 1907 (34 Stat., 1167), provided for furnishing at Government expense heat and light "actually necessary for the authorized allowance of quarters for officers and enlisted men."

Held, that while the law allowed, for the time being, a duplication of quarters to officers temporarily absent on duty in the field, one set at the officer's permanent station and another in the field, there was no authority for heating and lighting both sets of quarters at Government expense, but that the officer might be provided with heat and light for his temporary quarters where he was serving, if it were shown that no such allowances had been provided at Government expense for his quarters at his permanent station.

(72-310, J. A. G., Aug. 13, 1914.)

MARINES: Quartermaster stores supplied to, while serving with the Army; reimbursement of appropriations.

Certain marines who, by order of the President, were serving with the Army in Vera Cruz, Mexico, had been supplied by the Quartermaster's Department of the Army with quartermaster stores needed for their service. Section 1135, Revised Statutes, provided that—

"The officers of the Quartermaster's Department shall, upon the requisition of the naval or marine officer commanding any detachment of seamen or marines under orders to act on shore, in cooperation with land troops, and during the time such detachment is so acting or proceeding to act, furnish the officers and seamen with camp equipage, together with transportation for said officers, seamen, and marines, their baggage, provisions, and cannon, and shall furnish the naval officer commanding any such detachment, and his necessary aids, with horses, accouterments, and forage."

Held, that the appropriation for the Quartermaster Corps should be reimbursed from Marine Corps appropriations for supplies so furnished. Op. J. A. G., C 20461, Jan. 31, 1907; *id.* 5-242, June 1, 1914; 13 Comp. Dec., 529.

(5-242, J. A. G., Aug. 12, 1914.)

MILITIA: Organized; pay of, while attending encampment; rank above commission.

An officer of the organized militia was commissioned a first lieutenant in the quartermaster's department of the state, but by special order of the adjutant general's office of the state his commission, with that of certain other officers, was continued in force for state military

purposes, but for United States service or other service entitling him to Federal pay, his rank was raised to captain. The organized militia of the state was made to conform to the Federal militia law, which required that the organization of the organized militia should conform to that of the Regular Army of the United States. In the Regular Army no provision was made for a first lieutenant in the organization of the Quartermaster Corps.

Held, that the officer, while attending an encampment of the organized militia, should be regarded as a first lieutenant in said militia for pay purposes, and could not be paid as of the rank of captain.

(58-600, J. A. G., Aug. 21, 1914.)

NEUTRALITY: Admission of sick and wounded belligerents to Army hospital.

It was currently reported that there were in the neighborhood of San Francisco, Cal., a number of naval vessels belonging to two European powers then at war with each other, and the question arose as to whether the facilities of the United States hospital at that place might be extended to the sick and wounded belligerents.

Held, that international law has long recognized it to be a proper act of humanity to grant asylum to soldiers and sailors of a belligerent (2 Oppenheim, 410), and that if the commander of a belligerent ship of war should request it, the benefits of the Army hospital might be extended to the sick and wounded officers and seamen of such vessels, but on the condition that such officers and seamen should become interned prisoners.

(99-700, J. A. G., Aug. 15, 1914.)

PRIVATE PROPERTY: Loss of, due to artillery practice; articles necessary for use in quarters.

An officer of the Army sustained the loss of a quantity of china and glassware which he valued at \$620, which loss was occasioned by the falling of a china closet in which it was contained, in his quarters at West Point, N. Y. The falling of the closet was due to heavy artillery practice at the post coupled with faulty construction of the closet.

Held, that from the unusually expensive character of the articles destroyed, they could not be considered such as the Secretary of War should determine to be reasonable, useful, and necessary for the officer in service while in quarters, within the meaning of the act of March 3, 1885 (23 Stat., 350), but that the claim might be adjusted and reported to Congress for appropriation under the provisions of the act of August 24, 1912 (37 Stat., 586), as a loss of private property not exceeding \$1,000 in value occasioned by heavy gun fire and target practice of troops, the act applying to losses of private property of officers residing upon military reservations as well as to losses of the property of civilians.

(18-463, J. A. G., Aug. 31, 1914.)

PURCHASE OF SUPPLIES: From persons in the military service.

A corporation duly organized under the laws of the State of Kansas submitted a bid for supplying butter at Fort Riley in said state for the month of June, 1914. The secretary of the company was a Government clerk in the United States Mounted Service School. Paragraph 521, Army Regulations, 1913, prohibited the purchase of supplies for the Government from any person in the military service or the contracting with any such person to furnish supplies or service to the Government.

Held, that said regulations did not apply to contracts made with incorporated companies (Dig. Op. J. A. G., 1912, p. 353 A 5), and recommended that the company be informed that the fact that some of its officers or stockholders might be employed in the military service did not disqualify it from submitting proposals to furnish supplies, but that paragraph 527 of the same regulations prohibited persons belonging to or employed in the military service from rendering assistance in the preparation of proposals.

(76-331.4, J. A. G., Aug. 4, 1914.)

REENLISTMENT: After four years' service and passing to the reserve.

The first proviso of section 2 of the act of August 24, 1912 (37 Stat., 590), provided that at the expiration of four years' continuous service under a first or a subsequent enlistment a soldier might be enlisted for another period of seven years, and that in such event he should receive his final discharge from his prior enlistment. The sixth proviso of said section provided—

"That, except upon reenlistment after four years' service or as now otherwise provided for by law, no enlisted man shall receive a final discharge until the expiration of his seven-year term of enlistment, * * * but any such enlisted man may be reenlisted for a further term of seven years under the same conditions in the Army at large."

Held, that a soldier who had [not] been reenlisted immediately after the completion of four years' service, but who had passed to the reserve, might be reenlisted for another term of seven years upon the condition precedent that he be given by the Secretary of War a final discharge from his prior enlistment for the purpose of such reenlistment, such a discharge being authorized in the interests of the Government.

(6-300, J. A. G., Aug. 22, 1914.)

VEHICLES: Passenger-carrying; ambulances.

Section 5 of the act of July 16, 1914 (Pub. No. 127, p. 61), provided in part as follows:

"No appropriation made in this or any other act shall be available for the purchase of any motor-propelled or horse-drawn passenger-carrying vehicle for the service of any of the executive departments or other Government establishments, or any branch of the Government service, unless specific authority is given therefor."

The use of ambulances for carrying passengers was forbidden by Army Regulations.

Held, that the normal use of an ambulance was for carrying sick and wounded and necessary nurses or attendants on duty therewith, who were not passengers within the general meaning of the term, and that an ambulance, although capable of being used for carrying passengers, was not a passenger-carrying vehicle within the meaning of the provision referred to.

(94-012, J. A. G., Aug. 14, 1914.)

VOLUNTARY SERVICE: Caring for and returning lost property.

A horse belonging to a battery of the Fourth Field Artillery stationed in Texas strayed from the battery stables during the night and was taken up by a private citizen, cared for, and returned to the military authorities. A claim was presented for the care of the animal and for forage fed to it before its return. No reward had been offered for the horse's return, and there were no facts upon which to base a contract to pay for the services rendered. The statutes of the state did not give a lien upon the horse in favor of the person taking it up and returning it under the conditions stated.

Held, that the services rendered were purely voluntary, and that no authority existed for the payment of the claim. 5 Comp. Dec., 37; 11 *idem*, 741.

(80-010, J. A. G., Aug. 28, 1914.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

BAILMENT: For hire; responsibility for loss of horse used contrary to contract.

A quartermaster of the organized militia hired a team from a private citizen for use as draft animals in connection with forces engaged in joint maneuvers. The circular advertising for proposals stated that each horse must be able to stand the necessary drive of not to exceed 12 miles each day with a load of 3,000 pounds or less for a four-line team. The team in which the horses were used was frequently required to haul more than the maximum load fixed in the advertisement, for a greater distance per day, and over roads very heavy and slippery; and was also subjected to extra hauling in bringing up food for the soldiers on rush orders. On coming in from one of such extra trips one of the horses was worn out and shortly thereafter dropped dead, due to overexertion.

Held, that the case was one of bailment for hire for the mutual benefit of the parties, and the horse having been used for a purpose substantially different from that for which it had been hired, and which use caused its death, the Government was liable for the loss of the horse and the claimant was entitled to be paid its value.

(Comp. Geo. E. Downey, Aug. 7, 1914.)

COMMUTATION OF QUARTERS: Assignment of, insufficient for family; station at place of duty.

An officer of the Ordnance Department of the Army was directed to "proceed to New York City, take station at that place, and report to the commanding officer of the Sandy Hook Proving Ground, N. J., for duty." At the proving ground there was a brick house owned by the Government and used as quarters for officers on duty there, which quarters consisted of one room for each officer, who also had the use in common with others of a dining room, a sitting room, and a reading room. The rooms were not adapted to the use of a family, and it was not permitted for officers to have their families there with them. The officer was furnished with quarters in this building of the character described. He had no duty to perform at New York City.

Held, that having no duty to perform at New York City, the order directing him to take station there could not operate to give him a right to commutation of quarters as at that place (7 Comp. Dec., 502), but that the actual station of the officer was at the place where his duties were to be performed (20 *id.*, 664). *Held further*, that quarters were the right of an officer for his personal use, and the Government was not obliged to furnish them for his family, nor was the availability for occupancy by a family the test of suitability of quarters; that the officer had been furnished with quarters (9 *id.*, 736); and that he was not entitled to the commutation paid him therefor.

(Acting Comp. W. W. Warwick, Aug. 25, 1914.)

CONTRACTS: Assignment of; payment to assignee.

The Treasury Department entered into a contract for the construction of a Federal building at Wahpeton, N. Dak. After a considerable amount of work had been done, permission was asked to transfer the contract to the contractor for another Government building, no change to be made in the terms of the contract.

Held, that while the transfer by one contractor to another of his rights under a Government contract in violation of section 3737, Revised Statutes, did not *ipso facto* annul the contract, but only gave the Government a right to annul the same, there was no authority for the officers of the Government to approve a proposed assignment or to recognize it in advance; that in the event of such transfer the Government might annul the contract and relet the work, or permit the work to be done by the contractor's assignee as his agent, the original contractor in either event to remain liable for any damages resulting from his failure to carry out the original undertaking; but that the department would not be authorized to pay the contract price to the assignee.

(Comp. Geo. E. Downey, Aug. 4, 1914.)

NOTE.—Where the assignment is to the surety on the bond of the contractor, see opinion of J. A. G. of August 10, 1914, page 3, *ante*; also 9 Comp. Dec., 43.

EXPENSES: Entertaining foreign officials; transportation of Army officer engaged in.

An automobile was hired by verbal authority of an official of the War Department for the transportation from Washington, D. C., to Gettysburg, Pa., and return, of officers of the British Government in this country on an official mission and an officer of the General Staff of the Army acting as their escort. A voucher was approved for payment from the appropriation for the transportation of the Army and its supplies.

Held, that the journey was in the nature of an entertainment of British officials and the hire of the automobile could not be regarded as a hire for official or military purposes, and that there was no appropriation in the Army appropriation act or any other appropriation available for the hire of an automobile for the purposes indicated.

(Comp. Geo. E. Downey, Aug. 8, 1914.)

EXPENSES: Of military attaché abroad; traveling expenses; pay of orderly and pay for tips.

An officer of the Army presented an account for reimbursement of his expenses while a military attaché at the American legation at St. Petersburg, Russia. The account represented cost of transportation to and from maneuvers which took place about 13 miles from St. Petersburg, his permanent station, the pay of an orderly, and tips given by attachés generally.

Held, that as the officer was designated to obtain military information and as his travel was considered necessary or desirable for the purpose, the necessary expenses of transportation to and from the maneuvers pertained to his duties as military attaché and should be paid by the United States (19 Comp. Dec., 594). *Held further*, that the items for pay of an orderly, and for tips, were personal expenses and not properly chargeable against the United States, and in the absence of any law authorizing the same they must be borne by the officer himself. 66 MSS. Comp. Dec., 433, Jan. 19, 1914.

(Acting Comp. W. W. Warwick, Aug. 19, 1914.)

PURCHASE OF SUPPLIES: In open market; advertising for contract.

The Comptroller on his own motion revised certain settlements of the Auditor for the War Department involving the purchase, without advertising, of supplies for the use of the Army in excess of the limit of \$500 authorized to be purchased without advertising by the amendment to section 3744, Revised Statutes, contained in the act of June 12, 1906 (34 Stat., 258).

Held, that said statute as amended permitted purchases in open market of supplies for all branches of the Army service when the aggregate amount required did not exceed \$500, and that in the future payments made by disbursing officers in excess of that limit for supplies or services must be based on advertisement and written contract.

(Comp. Geo. E. Downey, July 28, 1914.)

QUARTERS: Hire of, by pay clerk where not furnished quarters in kind; reimbursement.

A pay clerk in the Army in pursuance of orders reported to the quartermaster at the Presidio, San Francisco, Cal., for assignment to duty. He applied for quarters for himself which were refused by the commanding officer for the stated reason that there were no quarters at that place available for assignment to said pay clerk. The department quartermaster requested that quarters be hired for him, but the Chief of the Quartermaster Corps stated that no funds were available for the purpose and no quarters were hired. The pay clerk thereupon hired quarters for himself and applied for reimbursement.

Held, that if at the time he applied for quarters there were unassigned quarters at the post, he was denied a right to which he was entitled, and if there were no public quarters available he had the same right to have quarters rented for his use as any other officer of the Army; but that the wrongful act of an officer of the Government in refusing to provide quarters for him did not raise a legal claim against the Government, and the pay clerk could not be reimbursed for the renting of quarters for himself or paid commutation therefor.

(Acting Comp. W. W. Warwick, Aug. 28, 1914.)

RETIRED ENLISTED MEN: Allotment of pay.

A retired enlisted man of the Army signed a written request to have a portion of his monthly pay paid to his wife until further notice. Section 16 of the act of March 2, 1899 (30 Stat., 981), authorized the Secretary of War to permit enlisted men to make allotments of their pay for the support of their families and for other purposes "during such time as they may be absent on distant duty, or under other circumstances warranting such action."

Held, that the act applied to enlisted men on the active list and not to retired enlisted men; that the allotment was unauthorized; and that the request should not be recognized for the purpose of drawing a check in favor of the soldier's wife.

(Acting Comp. W. W. Warwick, Aug. 22, 1914.)

TRAVEL ALLOWANCES: On discharge; enlisted men; transportation from place of discharge.

The act of August 24, 1912 (37 Stat., 576), provided that when an enlisted man of the Army was discharged from the service, except by way of punishment for an offense, he should be entitled to transportation in kind and subsistence from the place of discharge to place of enlistment or to such other place within the continental limits of the United States as he might select to which the distance was no greater. A discharged soldier had been furnished transportation from a place other than his place of discharge to a place other than his place of enlistment, the distance being less than from place of discharge to place of enlistment, but the distance from place of dis-

charge was greater to the place to which transportation was furnished than to the place of enlistment.

Held, that the issuance of transportation from a place other than the place of a soldier's discharge or to a place the distance to which was greater than from place of discharge to place of enlistment, was unauthorized. The Comptroller declined to lay down a rule for the adjustment of the account of an officer issuing transportation in excess of that to which the soldier might be entitled, as that would be to anticipate a violation of the law.

(Comp. Geo. E. Downey, Aug. 4, 1914.)

TRAVEL ALLOWANCES: On discharge; transportation varying from request.

The act of August 24, 1912 (37 Stat., 576), provided for enlisted men discharged, except by way of punishment for an offense, transportation from place of discharge to place of enlistment or to any other place within the continental limits of the United States to which the distance was no greater. Pullman transportation requests were issued to the Pullman Co. by the quartermaster at Fort McDowell, Cal., to three discharged enlisted men of the Army calling for an upper berth from San Francisco, Cal., to El Paso, Tex., to Buffalo, N. Y., and to Washington, D. C., respectively. Instead, the Pullman Co. furnished from San Francisco, one lower berth in a tourist sleeper to Portland, Oreg., one to New Orleans, La., and one to Chicago, Ill., aggregating \$14.25 in cost as against \$16.80 had Pullman berths been furnished according to the requests.

Held, that the transportation request was an order by an agent of the Government on the carrier to furnish the class or character of transportation specified therein, between the points named, and to the persons named in the request, and that as the transportation furnished was not that which was requested by the Government, there was no privity of contract between the Government and the company with respect thereto. Under the circumstances the account presented was allowed as arising not upon the request, but upon a *quantum meruit*; but advised that transportation companies should be given to understand that they must adhere to the stipulations of the request or run the risk of having their claims for transportation denied.

(Comp. Geo. E. Downey, Aug. 14, 1914.)

BULLETIN 46.

BULLETIN }
No. 46. }

WAR DEPARTMENT,
WASHINGTON, *October 24, 1914.*

The following digest of opinions of the Judge Advocate General of the Army for the month of September, 1914, and of certain decisions of the Comptroller of the Treasury and of the courts, is published for the information of the service in general.

[2194536 B—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

W. W. WOTHERSPOON,
Major General, Chief of Staff.

OFFICIAL:

H. P. MCCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

CIVILIAN EMPLOYEES: Failure to pay debts; disobedience of order requiring specific payments.

Upon complaint of his creditor, a civilian employee of the War Department was ordered by the department commander to pay \$10 per month on the 1st of each month until he had settled an indebtedness of \$125. The employee, after making one such payment, claimed that he was unable to pay \$10 per month, and asked to be permitted to pay \$5 per month. This was refused, and he was ordered to continue the payments of \$10 per month. Subsequently, he was charged with failing to obey the last order. The employee's answer was in substance that he was unable to make the payments. His discharge was thereupon recommended for disobedience of the order.

Held, that the Secretary of War would not be justified in ordering the employee discharged for disobedience, without having clear evidence that he was able to make the required payments and willfully neglected to do so; that the department does not undertake to require employees to discharge their debts by the payment of any special amount, but regards the failure of an employee to settle a debt which he is able to pay and the nonpayment of which would result in complaints to the department as detrimental to the service and as indicating his unfitness therein, the same rule applying to civilian employees as to officers of the Army.

(16-433, J. A. G., Sept. 18, 1914.)

COURTS-MARTIAL: Suspended sentence; pay during confinement; form of sentence.

The Army act of April 27, 1914 (Pub. No. 91, p. 4), provided:

"That the reviewing authority may suspend the execution of a sentence of dishonorable discharge until the soldier's release from confinement."

Held, that the usual form of sentence, "to be dishonorably discharged with forfeiture of all pay and allowances," would limit the forfeiture of pay to the date of the promulgation of the sentence, when it would be assumed that the sentence of dishonorable discharge should take effect, and that where such a sentence with confinement was imposed, a suspension of the sentence as to the dishonorable discharge would leave the soldier in receipt of pay during confinement. *Advised*, that the sentence of forfeiture of pay should be in the following form:

"To forfeit all pay and allowances due or to become due while undergoing confinement in pursuance of this sentence."

(72-214, J. A. G., Sept. 11, 1914.)

COURTS-MARTIAL: Summary courts; constitution of.

A soldier was tried and convicted by the recruiting officer acting as a summary court-martial in a district in which another recruiting officer was on duty in charge of an auxiliary or branch recruiting station. The act of March 2, 1913 (37 Stat., 722), provided that the commanding officer of a garrison, fort, camp, or other place where troops are on duty might appoint a summary court-martial for his command, and further:

"That when but one officer is present with a command, he shall be the summary court-martial of that command, and shall hear and determine cases brought before him."

Held, that the branch recruiting office being in the same post or command as the principal office, there was more than one officer present with the command, and that the law by clear implication forbade the commanding officer to appoint himself as a summary court or to act as such when there was another officer with his command. *Held therefore*, that the court was illegally constituted and its sentence null and void.

(30-730, J. A. G., Sept. 24, 1914.)

DAMAGES: Mistake in transmitting telegram; limiting liability of telegraph company.

A Government telegram delivered to a telegraph company for transmission read:

"The Secretary of War finds it necessary to retain you here on account of prospective important duties."

In transmitting the same the word "retain" was changed to "return," in consequence of which the officer to whom it was directed traveled from the place where he was located to Washington, D. C., and return, for the purpose of reporting in pursuance of said supposed order. By a stipulation printed on the back of the blanks

used by the telegraph company its liability in case of error in transmission was limited to a certain amount, unless the message was repeated. The message in question was not written upon such a blank. The telegraph company had assented to the rates fixed by the Postmaster General in pursuance of section 5266, Revised Statutes, to be charged for Government telegrams over lines of companies receiving benefits from the public domain, which rates were fixed without reference to any special contract limiting the liability of the transmitting companies.

Held, that the telegraph company was liable in failing to correctly transmit the telegram (37 Cyc., 1670), and that the expense of the officer's travel, being a proximate result of the error in the transmission of the message, should be charged against the company in the settlement of its accounts.

(22-050, J. A. G., Sept. 11, 1914.)

DETACHED SERVICE: Status while traveling, on leave, or awaiting orders.

A colonel of the Army serving with his regiment was about to be retired from active service on account of age. He had not served two years out of the last preceding six years with his appropriate command, and so was not eligible for detached service under the law of April 27, 1914 (Pub. No. 91, p. 7), which provided that an officer of his grade who had not been actually present for duty for at least two years out of the last preceding six years with a command appropriate to his grade should not be detached nor permitted to remain detached from such command "for duty of any kind," except as otherwise specifically provided; under a penalty of forfeiture of the pay of the superior officer by whose order or permission said requirement was violated.

Held, that if said officer should be ordered to his home to await his retirement, or ordered to his home and then given leave of absence until the date of his retirement, he would not be detached "for duty of any kind," within the meaning of said law, while traveling in obedience to said orders, while on leave, or while awaiting his retirement.

(6-124, J. A. G., Sept. 8, 1914.)

GUARDIAN AND WARD: Appointment; consenting to enlistment of minor.

Questions were submitted for opinion as to whether a minor over 18 years of age whose parents resided permanently in a foreign country might have a guardian appointed in this country, and whether the consent necessary for the purpose of accepting such minor for enlistment as a soldier would be legal if signed by such a guardian.

Held, that the appointment of a guardian under the circumstances mentioned was a matter that must be determined by the court having jurisdiction upon taking the proper procedure, and that it would be competent for a guardian so appointed to sign the consent neces-

sary for the acceptance of his ward for enlistment as a soldier, such action being within the usually recognized powers of a guardian over his ward.

(34-070.1, J. A. G., Sept. 24, 1914.)

MILITARY RESERVATIONS: Violation of regulations; authority to make.

An affidavit in the nature of a complaint or information charged an individual with having violated the regulations promulgated by the Secretary of War for the government of the Gettysburg National Park by driving an automobile therein at a rate of speed in excess of 12 miles an hour. The act of May 15, 1909 (29 Stat., 121), provided that national military parks should be open only under such regulations as the Secretary of War might prescribe, and section 6 of the act of February 11, 1895 (28 Stat., 651), made it the duty of the Secretary of War to establish and enforce regulations for the custody, preservation, and care of monuments in the Gettysburg National Military Park. Section 45 of the Criminal Code of the United States prescribed a punishment for anyone who "shall go upon any military reservation, army post, fort, or arsenal, for any purpose prohibited by law or military regulation made in pursuance of law."

Held, that the statutes authorizing the Secretary of War to make regulations for the government of the national military parks were not a delegation of legislative authority (*United States v. Grimaud*, 220 U. S., 506), and recommended that the papers be referred to the Attorney General for his action.

(80-430.1, J. A. G., Sept. 29, 1914.)

PRISONERS: Under suspended sentence of dishonorable discharge.

General Order No. 56, W. D. 1913, provided that only general prisoners should be enrolled in disciplinary companies. Certain prisoners had received sentences including dishonorable discharge, but which discharges had been suspended in pursuance of law.

Held and advised—

(1) That were it not for the suspensions of the sentences of dishonorable discharge, said prisoners would clearly be general prisoners, and it was suggested that they be carried as "General prisoners under suspended sentence."

(2) That if a soldier's enlistment should expire during his confinement, report should be made of the soldier's character and conduct, with recommendation as to the discharge to be given him, in time to vacate the order suspending the dishonorable discharge or to remit said discharge and the remainder of the term of confinement and restore him to duty, before the expiration of such enlistment; but that he should be carried on the rolls of his organization until discharged or transferred, although there would be no objection to mustering this class of prisoners on one roll.

(3) That this class of prisoners should be credited with good-conduct time during confinement the same as general prisoners.

(30-482, J. A. G., Sept. 3, 1914.)

PRIVATE PROPERTY: Of retired soldier who died in Army hospital; disposition of; Articles of War.

A retired hospital steward, having been taken seriously ill in a hotel in San Diego, Cal., was removed to the post hospital at Fort Rosecrans, Cal., in a comatose condition, where he died the next day without regaining consciousness. Apparently he left no will and had no relatives. The commanding officer, holding that the personal property of the soldier should be disposed of as required by the 127th Article of War and Army Regulation 163 of 1913, declined to deliver it to the county public administrator, who had been appointed administrator to take over the estate and administer thereon under the direction of the probate court.

Held, that the action of the commanding officer and post surgeon in securing the effects of the deceased soldier and in forwarding the inventory to The Adjutant General of the Army, was correct; that the administrator appointed by the court was a legal representative within the purview of the 127th Article of War; and that the property should be taken outside the reservation and there turned over to the administrator, so as to bring it within the jurisdiction of the state. Dig. Op. J. A. G., 1912, p. 939 (g).

(6-155, J. A. G., Sept. 18, 1914.)

PUNISHMENT: Additional to sentence; conduct regulations.

By a conduct-grade classification in force at Fort Grant, Canal Zone, the enlisted men were divided into three classes, A, B, and C. Class A men were furnished permanent passes and allowed to be absent from the post, except when detailed for duty, from report until reveille; class B men were permitted to leave the post when not on duty by obtaining each time a regularly signed pass; and class C men, which included all who were undergoing company punishment or who had been recently tried, were restricted to the limits of the post. A private soldier was tried by court-martial and sentenced only to forfeiture of \$10 of his pay per month for three months. In the operation of said regulations he was to be confined to the limits of the post until the termination of the forfeiture.

Held, that the restriction of the soldier to the post as the result of his conviction by court-martial when his sentence involved forfeiture of pay only, was not authorized, as such restriction thereby increased the duly adjudged punishment in violation of a well-settled rule of military law; and that so much of the method of classifying men according to conduct at said fort as resulted in confining them to the post as a consequence of conviction by court-martial, in addition to a prescribed sentence, was contrary to military law and should be discontinued.

(30-750, J. A. G., Sept. 14, 1914.)

SUPPLIES: Purchase of; contractor's request for relief from contract on account of increased prices due to European war.

A bidder asked to be relieved from awards made to him for the supply of 1,300,000 pounds of oats under his bid of July 26, 1914, on the ground that after the acceptance thereof by the Government the

unexpected advance in the price of oats was so great, due to the European war, that to furnish them at the price proposed would amount to his financial ruin. His bid was secured by an absolute guaranty binding the bidder, upon notice of acceptance of his bid, to make deliveries in accordance with the terms of the proposal and acceptance, or, if so required by the United States, to duly enter into a contract and furnish bond for the deliveries.

Held, that the Secretary of War had no power to grant the request, and that Congress alone could give the desired relief.

(76-600, J. A. G., Sept. 21, 1914.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

ABSENCE: Without authority; pay of civilian clerk, Quartermaster Corps.

A clerk in the Quartermaster Department of the Army employed in the Philippines was granted 30 days annual leave in accordance with the provisions of the War Department circular of July 7, 1904, with permission to visit the United States. Said circular provided that such a leave should be calculated from the date the employee arrived in the United States from the Philippines to the date when he should leave San Francisco, Cal., in returning thereto. The clerk arrived in the United States on October 15, 1913, and his granted leave expired November 18 following. He was granted an extension on account of sickness, and this extension expired December 18. He left San Francisco on his return to the Philippines January 4, 1914.

Held, that from the date following the expiration of his leave as extended on account of sickness until he sailed from the United States for the Philippines, he must be regarded as absent without authority and not in a pay status, and that payment to him of his pay for this period was erroneous.

(Acting Comp. W. W. Warwick, Sept. 4, 1914.)

CONTRACTS: Delays in completion; unforeseeable cause.

A contract provided for the construction for the Government of eight steel barges to be delivered by a specified time, with a provision for the payment as liquidated damages of the sum of \$5 for each day during which each barge should remain undelivered after the agreed date. A provision in the contract extended the time during which delivery might be made for a period equal to the time lost "on account of unusual freshets, ice, rainfall, * * * or other unforeseeable cause of delay arising through no fault of the contractor" which might actually prevent completion within the agreed time. Before any construction work on the barges had been done a fire of unknown origin almost completely destroyed the contractor's plant and thus delayed the work of completing the barges for at least 40 days from that date.

Held, that the fire was an "unforeseeable cause of delay" within the meaning of the contract (18 Comp. Dec., 438), and as the delay thus caused exceeded the delay in the completion of the contract above the contract time, the contractor could not properly be charged with damages for the delay.

(Acting Comp. W. W. Warwick, Aug. 31, 1914.)

DAMAGES: Unliquidated; breach of contract; jurisdiction of accounting officers.

A contract provided for the delivery of 20,000 pounds of frankfurters upon the U. S. steamer *Celtic* at the navy yard, Brooklyn, N. Y., by April 20, 1914. The vessel sailed before the date named for delivery, and a verbal understanding was entered into to the effect that the contracting company should hold the frankfurters for future delivery, the Government to assume any charges that might accrue thereon due to its inability to receive the goods on the date named in the contract. The claim was disallowed by the auditor on the ground that it "is one for 'unliquidated damages' which the accounting officers of the Treasury Department are not authorized to settle."

Held, that the claim was not for damages incident to the breach of the contract, but for services rendered at the request of the proper Government officer, who was competent to contract therefor and to agree with the contractor after as well as before the performance, as to the value of the services (*United States v. Corliss Steam Engine Co.*, 91 U. S., 321; 22 Op. Atty. Gen., 437; 6 Comp. Dec., 648; 14 *id.*, 589; 15 *id.*, 439; 16 *id.*, 504); and that the actual value of such services having been agreed upon by the parties, the claim presented, instead of being one for unliquidated damages, was a liquidated claim for the value of services actually rendered, which should properly be allowed and paid.

Held further, that under section 236, Revised Statutes, which provided that "All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or creditors, shall be settled and adjusted in the Department of the Treasury" and the act of July 31, 1894 (28 Stat., 205-209), the accounting officers of the Treasury Department have jurisdiction, except where otherwise provided by statute, to settle all claims, whether liquidated or unliquidated; but they may not be able in some cases, because of lack of evidence or facilities to obtain it, to determine the justness of unliquidated claims, in which event such claims should be disallowed for that reason alone, and not on the ground of lack of jurisdiction; but *held further*, that the settlement of claims for unliquidated damages for torts involve no jurisdictional question in the accounting officers, and that such claims should be settled but should not be allowed, because they involve no proper legal charge against the Government.

(Comp. Geo. E. Downey, Sept. 9, 1914.)

HEAT AND LIGHT: Reimbursement of officer occupying house containing more rooms than his authorized allowance of quarters.

A lieutenant colonel of the Army, entitled to 6 rooms as quarters, occupied a private house containing 12 rooms, 2 of which were used solely for storage purposes, were not heated, and were not lighted except on rare occasions, while the other 10 rooms were heated and lighted at the officer's expense. The building was separately heated and lighted, but there was no provision for separately heating and lighting any set of rooms corresponding to the officer's legal allowance of quarters.

The act of March 2, 1907 (34 Stat., 1167), provided for furnishing, at the expense of the United States, the heat and light necessary for the authorized allowance of quarters for officers under regulations to be prescribed by the Secretary of War. The regulations as amended fixed a money allowance per month for heating rooms actually occupied by officers within the limit of their allowance according to zones of equal temperature instead of the allowance of fuel in kind theretofore provided by regulations, and a similar provision was made in the regulations respecting the lighting of such quarters, the amount to be paid to the owners of the quarters or their authorized agents.

Held, that the officer was entitled to reimbursement upon the proper vouchers for the entire amount expended by him for heat for the entire house occupied as quarters, not to exceed the money allowance fixed by regulation for six rooms in the zone in which the house was located, and that the Quartermaster Corps should pay the company furnishing the illuminating supply upon the same basis.

(Comp. Geo. E. Downey, Sept. 11, 1914.)

PURCHASES: By one bureau or department from another; adjustment of appropriations.

The Army appropriation act of April 27, 1914 (Pub. No. 91, p. 21), provided that—

“Hereafter in the settlement of transactions between appropriations under the Engineer Department, or between the Engineer Department and another office or bureau of the War Department, or of any other executive department of the Government, payment therefor shall be made by the proper disbursing officer of the Corps of Engineers or of the office, bureau, or department concerned.”

Held, that in making payment for purchases for the Department of Commerce from the Engineer Department of the Army, the amount should not be deposited to the official credit of the officer of the Engineer Department, but the voucher should be prepared as in the case of an ordinary purchase of supplies from a dealer and payment made by check to the Chief of Engineers; and that checks received in payment of supplies furnished or services rendered to the Engineer Department should be indorsed to the Treasurer of the United States for deposit to the credit of the proper appropriation.

(Comp. Geo. E. Downey, July 18, 1914.)

REPAIRS: Damages to lighthouse tender by steamer of the Quartermaster Corps.

A lighthouse tender belonging to the Department of Commerce was damaged by a steamer belonging to the Quartermaster Corps, and a bill of \$70 was rendered in favor of a private concern for making the necessary repairs. A board of officers detailed for the purpose of examining into and reporting upon the case, recommended that no one be held responsible for the damage inflicted.

Held, that the repairs having been accomplished, payment of the bill should be made by the disbursing officer of the Department of Commerce upon presentation of proper vouchers, and that the amount could not be charged to or paid from funds of the Quartermaster Corps, as such repairs, subserving no purpose for which the funds were appropriated, would be without consideration, and as there was no appropriation of the Quartermaster Corps available for such purpose. 6 Comp. Dec., 74.

(Comp. Geo. E. Downey, Sept. 18, 1914; see also decision of Sept. 22, 1914, in the matter of replacing a beacon light destroyed by a tug of the Engineer Department.)

TRAVEL ALLOWANCES: Charge for space reserved in pursuance of transportation request.

A discharged soldier by means of a Government transportation request secured passage on a steamer en route to point of enlistment. About two hours before the steamer sailed he returned his ticket and canceled the passage. On account of the lateness in canceling the passage, it was impossible to resell the berth, although the steamer was booked full, and passengers had been turned away. A rule of the company provided that—

“When tickets are presented for redemption less than 48 hours in advance of sailing on crowded ships, and the accommodations so released can not be resold, a forfeiture of 50 per cent will be exacted. Such ticket may be refunded on this basis, or will be made valid for later sailings upon additional payment of 50 per cent of the regular passage rate.”

The regular passage was \$50, and the company presented its bill for \$25 in accordance with said rule.

Held, that the amount claimed was not damages for breach of contract, but was a fixed charge for space reserved and held for the soldier's occupancy, and was, in fact, for a service rendered, and that the amount should be allowed. *Held further*, that if transportation should thereafter be furnished to the soldier the amount of said allowance should be deducted therefrom.

(Comp. Geo. E. Downey, Sept. 28, 1914.)

TRAVELING EXPENSES: Of military attachés abroad; payment of; appropriation.

Appropriation was made by the act of March 2, 1913 (37 Stat., 704), under the heading “Contingencies, Military Information Section, General Staff” for “the actual and necessary traveling expenses incurred by military attachés abroad under orders from the Secre-

tary of War, to be expended under the direction of the Secretary of War."

The Army act of April 27, 1914 (Pub. No. 91, p. 1), contained an identical provision.

Held, that if a military attaché abroad under orders from the Secretary of War was compelled to travel in pursuance of his duty, his actual and necessary expenses incident to said travel were payable from the appropriation named; and that he was not entitled to the mileage allowance of 7 cents per mile for such travel as provided by the act of June 12, 1906 (34 Stat., 247), for officers of the Army traveling under orders without troops.

(Comp. Geo. E. Downey, Sept. 14, 1914, 21 Comp. Dec., 148.)

DECISIONS OF THE COURTS.

(Digests prepared in the office of the Judge Advocate General.)

CONTRACTS: Supplemental; liquidated damages; waiver.

A contract provided for the construction for the Government within seven months from the date of its approval of a pumping plant for a dry dock at the New York Navy Yard. After a portion of the work had been done, the Government decided to connect said dry dock with another and to build a single pumping plant for both. A supplemental contract was entered into whereby the contractor agreed, for an additional sum, to furnish all material and labor necessary for carrying out the changes in and additions to the plant originally contracted for, and the time of completion was extended. Thereafter the progress of the work was delayed, without fault of the contractor, by a controversy as to the proper method of constructing a portion of the work. After the date fixed for the completion of the work by the supplemental contract, two other supplemental contracts were entered into covering additional work and changes found necessary in the original plans, which changes caused the controversy. In neither of said supplemental contracts was mention made of date of completion or of former delays. No delays were chargeable to the contractor until some time after the execution of the last supplemental contract, when delays occurred through the fault of a subcontractor. After the completion and acceptance of the work settlement was made by deducting for 240 days' delay at the rate of \$25 per day, stipulated in the original contract as liquidated damages.

Held, that while reasonable liquidated damages for delays were not to be regarded as penalties, yet where contracts provided for such damages, if one party prevented the other from completing the work in time, liquidated damages could not be insisted upon, even though the subsequent delay was due to the fault of the contractor, and that where the original Government contract provided for liquidated damages for delay beyond a specified date, and the supplemental contract contained no fixed rule for the time of completion, the Government was limited in its recovery to actual damages sustained by reason of the delay.

(*United States v. United Engineering & Contracting Company*, May 8, 1914, 234 U. S., 236.)

LIVING EXPENSES: Clerk of the Quartermaster Corps on temporary duty; Army Regulations.

A clerk of the Quartermaster Corps regularly stationed at Fort Riley, Kans., proceeded under orders to San Antonio, Tex., for temporary duty with the division to be formed there. On the date on which he arrived at his destination Army Regulation No. 744 of 1910 was in force, which provided that reimbursement for actual expenses, when traveling under orders, would be allowed to civilian clerks in the employ of any branch of the military service, among them the following:

"Cost of meals, and lodgings including baths, tips, and laundry work, not to exceed \$4.50 a day while on duty at places designated in orders for the performance of temporary duty."

Thereafter the Secretary of War approved a recommendation that the reimbursement mentioned be allowed for not more than 30 days, and that that period be made the limit of time for which such reimbursement should be paid to those who might thereafter be assigned to temporary duty at a place other than their permanent station, whatever the length of time of temporary service. This order was not carried into the Army Regulations, but notice thereof was communicated to the clerk before the expiration of the first 30 days of his assignment to duty at San Antonio.

Held, that the allowance, resting on regulation only, could be withdrawn by a modification of the regulation; that in making or changing Army Regulations the President might legally act through the Secretary of War; that the fixing of 30 days as the limit of temporary duty in said case was wholly within the discretion of said Secretary of War; and that the clerk had no legal claim for reimbursement for living expenses incurred beyond said period of 30 days.

(*Marwell v. United States*, Ct. Cls. No. 31246, Feb. 9, 1914.)

NAVIGABLE WATERS: Riparian rights; paramount authority of the United States; harbor lines.

A riparian owner in the State of Virginia, where a fee-simple title runs to low-water mark in the bed of a navigable river, had constructed a wharf for shipping lumber out to a harbor line established by harbor commissioners under authority of a statute of the State. After the construction of said wharf the same harbor line was adopted by the Secretary of War on behalf of the United States, under authority of the act of August 11, 1888 (25 Stat., 425), as the National Government's limit of navigable water. Thereafter the Secretary of War established a new navigation or harbor line which brought a portion of said structures within the navigable area of the river, and the owner was notified of the change and of the necessity for the removal of such structures. Later the Secretary of War, assuming that the owner had taken the risk of a change in the line of navigation when it located its structures, abandoned condemnation proceedings which had theretofore been instituted and notified the owner of his intention to remove the portion of the structures which fell within the new line of navigation. A suit for an injunction against such proceedings was thereupon commenced.

Held, that all State laws and regulations with respect to navigable water, and all rights acquired under them, were subject to the paramount right of the United States to appropriate any portion of the submerged soil for the purposes of navigation.

Held further, that a harbor line established by the Secretary of War, under authority conferred by Congress, was subject to change by the same authority, and while a riparian owner might lawfully construct piers and docks to the established line, in doing so he takes the risk of such change if required for the improvement of navigation, which was not a matter for judicial inquiry, and that the removal by the Government of so much of his structures as extended beyond the new line was not a taking of his property for which he was entitled to compensation.

(*Garrison v. Greenleaf Johnson Lumber Co.*, U. S. C. C. A., June 1, 1914, 215 Fed. Rep., 576.)

BULLETIN 50.

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No. 50. }

WAR DEPARTMENT,
WASHINGTON, *November 14, 1914.*

The following digest of opinions of the Judge Advocate General of the Army for the month of October, 1914, and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2227416, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

W. W. WOTHERSPOON,
Major General, Chief of Staff.

OFFICIAL:

H. P. MCCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

APPROPRIATIONS: Special and general; limit on expenditures for hospitals.

In appropriating for "construction and repair of hospitals at military posts already established and occupied" in the Urgent Deficiency Act of June 25, 1910 (36 Stat., 664), a proviso was added that

"No more than sixty thousand dollars shall be expended in the erection of a hospital at the recruit depot at Angel Island, San Francisco."

The full amount authorized had been expended in the erection of such a building, but it was stated that the partitions of the annex were incomplete, with no finish of any kind, and that the main building lacked painting and interior finish. An allotment was desired from the appropriation for the construction and repair of hospitals for the purpose of completing said work.

Held, that the appropriation for the construction of the hospital was specific and was the only one that could be applied to the object named, and that it would not be legal to expend additional funds for the completion of the building from any other appropriation.

(5-061, J. A. G., Oct. 16, 1914.)

BIDS: For purchase of supplies; alteration of proposal after opening of bids.

A company, in response to an advertisement for proposals for furnishing stationery, wrapping paper, etc., during the fiscal year 1915, submitted a proposal which, as to all but one item, was qualified by

the condition that the bids should apply only to shipments made within sixty days from September 11, 1914, the reason given being that the European war had so unsettled the paper market that arrangements could not be made with paper mills for the delivery of paper for the entire year. Subsequently to the opening of the bids the company withdrew said condition. The prices bid by said company were lower than those of other competitors.

Held, that the bid was not responsive to the advertisement, which called for the furnishing of such supplies as might be ordered from time to time during the fiscal year, and that the condition named in the bid could not be regarded as a slight failure to conform to the terms of the advertisement, which, under paragraph 546, Army Regulations, 1913, need not necessarily lead to the rejection of a bid, and that the bid could not properly be accepted. *Held further*, that if the other bids were found to be unreasonable, taking into consideration the bid in question, such other bids might be rejected for that reason, and recourse had to an open market purchase, the requirements of the law as to advertising having been satisfied. Dig. Op. J. A. G. 1912, 311 H.

(76-260, J. A. G., Oct. 23, 1914.)

CONTRACTORS: Defaulting; failure to pay laborers and material men; withholding payment by the United States.

A contractor for the construction of certain roads, walks, and a storage tank at Fort Sill, Okla., failed to make settlement with material men for material furnished in connection with the execution of the work, and the surety on his bond given for the protection of laborers and material men, pursuant to the Act of August 13, 1894 (28 Stat., 278), as amended by the Act of February 24, 1905 (33 Stat., 811), requested that some arrangement be made with respect to the unpaid balance under the contract for his protection as against his liability to laborers and material men.

Held, that while the Government was under no strict legal obligation to defer payments to a contractor after they had become due, in the interest of laborers and material men who were protected by the contractor's bond, yet it was under an equitable obligation to see that such laborers and material men were paid (*Henningsen v. United States Fidelity & Guaranty Company*, 208 U. S., 404), and that in recognition of such obligation it should withhold payments to the contractor until the parties interested are given a reasonable opportunity, in due course of procedure, to secure the appointment of a receiver or trustee for receiving the moneys due.

(76-742, J. A. G., Sept. 23 and Oct. 17, 1914.)

DESERTION: Forfeiture of pay and allowances accrued under a prior enlistment; rations account.

A soldier was discharged with an amount standing due to him on his ration account while in hospital. He immediately reenlisted, and deserted without having received the amount due.

Held, that while a soldier deserting the service forfeits all pay and allowances due at the date of desertion by reason of the viola-

tion of his enlistment contract, the rule does not extend to amounts due under an enlistment prior to that from which he deserted, which enlistment had been closed by an honorable discharge, and that the amount due the soldier from his previous enlistment was not forfeited by the desertion.

(72-532.3, J. A. G., Oct. 8, 1814.)

EVIDENCE: Compelling a person to give evidence against himself.

It was proposed to order an officer to a certain place for identification by civilian witnesses in relation to charges which were pending against said officer.

Held, that such an order would not be in violation of the officer's privilege not to be required to give evidence against himself, as it calls for no testimonial communications from him. (*Holt v. United States*, 218 U. S., 245.)

Held further, that the absence of such officer from his command in obedience to the order would not be considered as such a detachment from his organization as would bring into operation the penalty clause of the provisions in the Act of August 24, 1912 (37 Stat., 571), with relation to the forfeiture of the pay of the superior officer by whose order or permission an officer should be detached, in violation of said act.

(6-124, J. A. G., Oct. 22, 1914.)

EXHIBITIONS: Exhibiting Government horses at horse shows; attending by organization.

A request was made that the War Department exhibit certain cavalry and artillery horses at the annual show of the Northwest Live Stock Association, to be held at Lewiston, Idaho, in December, 1914. The Army Appropriation Act of April 27, 1914 (Pub. 91, p. 15), in appropriating for horses for the Army, contains the proviso:

"That hereafter no part of this or any other appropriation shall be expended for defraying expenses of officers, enlisted men, or horses in attending or taking part in horse shows or horse races; but nothing in this proviso shall be held to apply to the officers, enlisted men, and horses of any troop, battery, or company which shall, by order or permission of the Secretary of War, and within the limits of the United States, attend any horse show or any State, county, or municipal fair, celebration, or exhibition."

Held, that horses belonging to organizations could be sent to such exhibitions at Government expense only when the organization to which they belonged was ordered or permitted to attend, and that the request in its limited form could not be complied with. Opin. J. A. G. (94-231, June 2, 1914.)

(94-231, J. A. G., Oct. 19, 1914.)

EXPOSITION: Expenses of officers and enlisted men with their mounts attending a mounted competition.

It was proposed to select three teams, one from each of as many different Army posts, composed of six officers and twenty-four en-

listed men each, with their mounts, for participation in a mounted competition at the Panama-Pacific International Exposition, and the question arose as to whether the proposed action would be in violation of the proviso contained in the Army Appropriation Act of April 27, 1914 (Pub. No. 91, p. 15), forbidding the expenditure of appropriations to defray the expenses of officers or enlisted men or horses "in attending or taking part in horse shows or horse races." The act contained a saving clause excepting from the above provision the attendance of officers, enlisted men, and horses of any troop, battery, or company attending under orders any horse show or any State, county, or municipal fair celebration or exhibition.

Held, that the participation in the events mentioned of the teams selected in the manner proposed could not be considered as an organizational participation within the meaning of the saving clause of said provision, but that the exposition in question should not be regarded as a horse show within the meaning of the proviso, and for that reason there would be no legal objection to authorizing the participation of the three teams as proposed in such competitive exhibitions, it being understood that the mounts referred to were the authorized mounts of the officers.

(94-231, J. A. G., Oct. 28, 1914.)

FUNERAL EXPENSES: Disposition of remains of Army nurses dying in the service.

The Sundry Civil Act of August 1, 1914 (Pub. No. 161, p. 25), appropriates, under the head of "Disposition of remains of officers, soldiers, civilian employees, and so forth," for the expenses of interment of the remains of officers and enlisted men of the Army on the active list and of the remains of civilian employees of the Army in the employ of the War Department who had died abroad or while on duty in the field or at any of the military posts within the limits of the United States.

Held, that the Army Nurse Corps having, by Section 19 of the Act of February 2, 1901 (31 Stat., 753), been made a part of the Army, nurses came within the provisions of the Sundry Civil Act for the disposition of the remains of officers, soldiers, and civilian employees in the military service, and that the remains of Army nurses who died in the service might be disposed of as in said Act provided. Opin. J. A. G., November 18, 1901, C. 11616.

(6-227.2, J. A. G., Oct. 8, 1914.)

HEAT AND LIGHT: Furnishing officer's allowance to his family at a place other than his station.

An officer on temporary duty on the Mexican border, with permanent station at San Francisco, Cal., desired to have his fuel allowance during such temporary duty issued to his family, occupying public quarters at Fort D. A. Russell, Wyo., upon the usual proof that he had not drawn his fuel allowance at his temporary station.

Held, following the decision of the Comptroller of the Treasury in the matter of the payment for heat and light furnished to the quar-

ters of officers, that fuel on account of an officer's allowance for heating his quarters could not be issued to his family at a place other than his permanent or temporary station, and that the proposed issues should not be authorized.

(72-311, J. A. G., Oct. 14, 1914.)

NOTE.—A letter from the Comptroller to the Secretary of the Treasury, to whom the above decision was rendered, advised the Secretary that the operation of his decision would be suspended until December 1, 1914, in view of the investigation being conducted by the War Department for the purpose of determining the value of the allowances for light, such determination to be followed by an amendment of paragraph 1057, Army Regulations, 1913.

INSANE PERSONS: Shipment and disposition of effects of insane soldiers after discharge.

An enlisted man who had become insane was removed from his station at Fort St. Michael, Alaska, to the Letterman General Hospital, San Francisco, Cal., and thence to the Government Hospital for the Insane, Washington, D. C., at which place he was discharged from the Army, but still remained an inmate of said institution. His household goods were retained at his former station the soldier having been unable to give any instructions in regard thereto.

Held, that the law did not authorize the shipment of any of the soldier's effects at Government expense after discharge, except such personal baggage as might be transported as his usual allowance on being returned to the place of enlistment on discharge, and that no authority existed for transporting the soldier's household effects from his former station to San Francisco, there to be retained in storage until he should be able to give direction as to their disposition. *Held further*, that, in view of the fact that if such property were left in storage indefinitely it would be subject to loss or deterioration, and in the absence of a duly appointed guardian, the Government might make such disposition thereof, without public expense, as might seem best for the interests of the soldier.

(44-000, J. A. G., Oct. 1, 1914.)

MILITIA: Eligibility for service in the organized; pensions for physical disability.

Section 1 of the Act of January 21, 1903 (32 Stat., 775), provided that:

"The militia shall consist of every able-bodied male citizen of the respective States, Territories, and the District of Columbia, and every able-bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age. * * *"

Held, that Congress not having defined the term "able-bodied" and not having fixed any standard of physical qualifications for entry into the organized militia other than is found in said expression, the determination of the state of fitness for membership in such militia rested with the recruiting officers of the States, acting under State

laws. *Held further*, that the receipt of a pension for physical disability incurred in the military service of the United States did not constitute a legal disability for membership in the organized militia, but that the Secretary of War might announce the allowance of such a pension as a disqualification for the receipt of pay, etc., from appropriations authorized by Section 1661, Revised Statutes, for the militia.

(58-230, J. A. G., Oct. 14, 1914.)

REPAIRS: Of property belonging to officers and enlisted men; use of private property by the United States.

A request for an allotment of appropriation to install a hot water bath apparatus for the command at Texas City, Tex., was disapproved by the Secretary of War, and the officers and enlisted men installed such fixtures at their own expense. A request was then made for authority to expend \$600 for the repair of such fixtures and additional funds for new installations.

Held, that while, as a general rule, repairs to private property used by the Government could not be made at Government expense unless the contract of rental provided for such repairs as a part of the consideration, the end desired in the present case might be accomplished by an agreement with the owners for the bailment of the property to the United States for a suitable period of time in consideration of its repair.

(5-003, J. A. G., Oct. 21, 1914.)

SALES: Disposition of proceeds of sale of manure from ambulance company; company fund.

The proceeds from the private sale of manure from an ambulance company at Galveston, Tex., amounted to from \$25 to \$30 per month. It was claimed that the proceeds accruing from the condemnation and public sale of the manure would not compensate for the inconvenience, and it was desired to know whether the same might be sold at private sale and the proceeds credited to the company fund.

Held, that Section 3618, Revised Statutes, required that the proceeds of the sale of old material, condemned stores and supplies, or public property of any kind, regardless of the method of sale, should be deposited and covered into the Treasury as miscellaneous receipts on account of proceeds of Government property (15 Ops. Atty. Gen., 322); and that there was no authority for crediting the amount received from the sale of manure from the ambulance company to the company fund.

(80-130, J. A. G., Oct. 7, 1914.)

TRAVEL ALLOWANCES: Excess of cost of transportation by a longer route.

A soldier who had enlisted at Jefferson Barracks, Mo., was discharged at Brownsville, Tex., and elected to take transportation to Baldwin, Miss., a distance not exceeding that from the place of discharge to place of his enlistment. He was furnished a transportation

request for transportation to Baldwin, Miss., by way of Mobile, Ala., at a cost of \$8.32 above the cost of such transportation from Brownsville direct to Baldwin.

Held, that the additional expense was unauthorized, and that the officer issuing the request could not be released from his responsibility by the War Department but that it would be necessary for him to seek such relief from Congress.

(94-300, J. A. G., Oct. 16, 1914.)

TRAVEL EXPENSES: Of officers of the Army abroad; military attachés and military observers.

An officer of the Army was assigned to special duty at London, England, under the direction of the United States Ambassador, in connection with the relief of stranded Americans in England, when he was ordered by the Assistant Secretary of War through the United States Ambassador at Paris, France, to act as military observer. In pursuance of orders, he proceeded from London, England, to Paris, France, and thence to Neufchatel, and returned to Paris. He presented a bill for his actual expenses of travel, including hire of an automobile for a portion of his travel, rendered necessary by the fact that on account of the war trains did not proceed as far as he desired to travel.

Held, that while as a military observer, he was attached to the American Embassy at Paris, for purposes of official recognition he could not properly be regarded as a military attaché within the meaning of the provision of the Army Appropriation Act of April 27, 1914 (Pub. No. 91, p. 1), relative to the payment of "actual and necessary traveling expenses incurred by military attachés abroad under orders from the Secretary of War," and that he was entitled only to mileage for his travel and not to actual expenses. 17 Comp. Dec., 204.

(94-210, J. A. G., Oct. 29, 1914.)

VEHICLES: Passenger-carrying; motor cycles for the Signal Corps.

Section 5 of the Legislative, Executive, and Judicial Act of July 16, 1914 (Pub. No. 127, p. 61), provides that—

"No appropriation made in this or any other act shall be available for the purchase of any motor-propelled or horse-drawn passenger-carrying vehicle for the service of any of the Executive Departments or other Government establishments, or any branch of the Government service, unless specific authority is given therefor, * * *."

Opinion was desired as to whether motor cycles purchased by the Signal Corps for use by telegraph linemen, repair men and orderlies came within the above statute. Said motor cycles were equipped for carrying linemen or repair men and their tools needed for the maintenance of lines in the field, and for the use of orderlies in carrying official messages, and were not equipped for carrying others than those engaged in the services named.

Held, that, considering the purposes for which the motor cycles were to be used, the same should not be regarded as passenger-carrying vehicles, within the meaning of the statute in question.

(94-012, J. A. G., Oct. 1, 1914.)

VOLUNTARY SERVICES: Expense of returning soldiers absent without leave to their commands.

A member of the police force at Houston, Tex., asked reimbursement for expenses consisting of car fare in returning to their command two recruits of the Twenty-eighth Infantry who were apprehended by the police of said city while absent without leave. They were not charged with desertion, but were tried for and convicted of absence without leave.

Held, that there was no law providing for the payment of expenses incurred by private parties in returning soldiers to their proper commands, except in the case of deserters, and, there being no express agreement to pay such expenses in the present case, nor any facts shown from which such an agreement might be implied, the service must be regarded as purely voluntary, and the claim should not be paid, following the rule in regard to the voluntary return of lost property. 5 Comp. Dec., 37; 11 *Id.*, 741; Op. J. A. G., Bul. 43, W. D., 1914, p. 9.

(26-206, J. A. G., Oct. 22, 1914.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

ABSENCE: From active duty on account of confinement; forfeiture of pay.

The Army Appropriation Act of April 27, 1914 (Pub. No. 91, p. 3), contains the following provisions:

"*Provided*, That hereafter no officer or enlisted man in active service who shall be absent from duty on account of disease resulting from his own intemperate use of drugs or alcoholic liquors or other misconduct shall receive pay for the period of such absence, the time so absent and the cause thereof to be ascertained under such procedure and regulations as may be prescribed by the Secretary of War: *Provided further*, That an enlistment shall not be regarded as complete until the soldier shall have made good any time in excess of one day lost by unauthorized absences, or on account of disease resulting from his own intemperate use of drugs or alcoholic liquors or other misconduct, or while in confinement awaiting trial or disposition of his case if the trial results in conviction, or while in confinement under sentence * * *."

On submission for a construction of said statute by the Auditor for the War Department,

Held, that in order to work a forfeiture of pay under the statute the absence must be on account of disease resulting from the causes stated in the first proviso, and that any absence from active duty with his organization or at his usual post of duty of an officer or enlisted man caused by confinement while awaiting trial, or undergoing punishment for any cause, would not result in loss of pay under the terms of the second proviso. 20 Comp. Dec., 69.

(Comp. Geo. E. Downey, Oct. 10, 1914.)

HEAT AND LIGHT: Light allowance to officers of the Revenue Cutter Service; Army Regulations.

Certain officers of the United States Revenue Cutter Service who by law were entitled to the same light allowances as officers of corre-

sponding rank of the Army, presented vouchers for the cost of electricity used by them in lighting their quarters, based upon the arbitrary allowances prescribed in paragraph 1057, Army Regulations, 1913, as amended by the Act of August 11, 1914. Officers of the Army were entitled by the Act of March 2, 1907 (34 Stats., 1167), to have provided them at Government expense the light actually necessary for their authorized allowance of quarters. The money values of the allowances prescribed by said regulation for lighting one room for one month between the 1st of September and the 30th of April at the rates of 85c. per thousand cubic feet of gas and 10c. per KWH. of electricity amounted to \$1.28 for gas and \$1.70 for electricity, and the same rates applied proportionately for the number of rooms actually occupied.

Held, that an inspection of the said rates in comparison with the known cost of lighting quarters in Washington, D. C., disclosed the fact that they were unreasonable, and in excess of the quantities actually necessary, and that the regulations prescribing such allowances were, therefore, in conflict with the law, and invalid. *Held further*, that the officers should pay the bills and present vouchers or claims for reimbursement to the extent of the cost of the quantities actually necessary to light their authorized quarters as occupied.

(Comp. Geo. E. Downey, Oct. 10, 1914.)

TRANSPORTATION: Hire of automobiles for officer traveling in mileage status.

An officer at Fort Sam Houston, Tex., was ordered to proceed "to Brownsville, Tex., on duty in connection with Mexican Federal prisoners and border patrol duty;" and, upon completion of this duty, to return to Fort Sam Houston. It was the officer's duty under the orders to inspect patrol stations along the Rio Grande River from Brownsville to Rio Grande City. Upon the officer's arrival at Brownsville it was found that recent storms had so damaged the roads along this route that he was obliged to hire and use an automobile for the trip, at an expense of \$7.50.

Held, that the officer's travel orders contemplated travel beyond Brownsville, namely, to the patrol stations along the Rio Grande River from Brownsville to Rio Grande City; that being in a mileage status he was entitled under the act of June 12, 1906 (34 Stat., 246), to seven cents per mile traveled and no more; that transportation which can be furnished an officer on a mileage status and charged against his mileage account is limited to transportation over established lines of common carriers; and that the expense of hire of extraordinary means of transportation, such as automobiles, is not authorized by law. (18 Comp. Dec., 851; 20 *Id.*, 485.)

(Comp. Geo. E. Downey, Oct. 31, 1914.)

TRANSPORTATION: Deduction on account of loss occurring in a prior shipment; delay in ascertaining the loss.

In settling an account of a transportation company, the Auditor for the War Department deducted \$14.13 as the cost of 108 pair of stockings, and freight thereon, being the shortage discovered in a prior shipment for the Government by the same company. The bill

of lading covering the former shipment had been accomplished without discovery of the shortage, and a copy of the receipt for the delivery of the freight was filed with the company. More than two months after the bill of lading had been thus accomplished, and on opening one of the boxes, the shortage was discovered, and it was then found that the box bore evidence of having been tampered with.

Held, that the receiving officer of the Quartermaster's Department should have satisfied himself at the time that the consignment was in good order and that he was negligent in not doing so, and that it would not be reasonable, after the lapse of such a length of time after the bill of lading had been accomplished, to cast upon the railroad company the burden of showing that no shortage existed. The amount deducted was, therefore, allowed.

(Comp. Geo. E. Downey, Oct. 17, 1914.)

TRAVELING EXPENSES: Of military attachés going to and returning from their posts of duty.

The Act of April 27, 1914 (Pub. No. 91, p. 1), under the head of "Contingencies, Military Information Section, General Staff Corps," contains an appropriation for the fiscal year 1915 for "the actual and necessary traveling expenses incurred by military attachés abroad under orders from the Secretary of War to be expended under the direction of the Secretary of War, * * *."

Held, that the Act created an exception to the regular mileage law for officers of the Army of June 12, 1906 (34 Stat., 246), in favor of military attachés abroad traveling under orders from the Secretary of War, but that it had no application until the officer detailed as military attaché reached his post of duty abroad, or after he should be relieved from duty as such attaché, and that until he reached his post of duty and after his relief therefrom his right to travel allowances was governed by the general mileage law.

(Comp. Geo. E. Downey, Oct. 21, 1914.)

TRAVELING EXPENSES: Expense incurred after return from journey.

A voucher was presented for reimbursement of traveling expenses of an officer of the Revenue Cutter Service, which included laundry and pressing of clothes after his return to his headquarters, and while he was no longer in a travel status. It was stated that the cause of the expense arose while he was traveling and that the work was actually postponed until his return because it could then be done at less cost than while on the road.

Held, that while there was much room to doubt the propriety or wisdom, not to say legality, of allowing bills for laundry and pressing clothes either as transportation or subsistence incident to travel under any circumstances, they had been allowed on the assumption that such expenses while in a travel status were greater than while the party was at home or at his regular station, but that in the present case, the work not having been done while the officer was on the road, but at the regular station and while he was not in a travel status, the claim should be disallowed. The decision in 18 Comp. Dec., 522, was disapproved in part.

(Comp. Geo. E. Downey, Oct. 12, 1914.)

BULLETIN 52.

BULLETIN }
No. 52. }

WAR DEPARTMENT,
WASHINGTON, *December 14, 1914.*

The following digest of opinions of the Judge Advocate General of the Army for the month of November, 1914, and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2194536 C—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Brigadier General, Chief of Staff.

OFFICIAL:

H. P. McCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

CONTRACTS: For replacement of automobile tires failing to make guaranteed mileage.

The question arose as to the legality of a proposed agreement with the Goodyear Tire & Rubber Company for the replacement of defective automobile tires with new ones, the Government to pay, upon the delivery of the new tires, a sum equal to the value of the mileage obtained from the old ones, based upon a six thousand mile guaranty, the original tires to be returned to the company.

Held, that while in a transaction involving the exchange of worn-out Government property for new articles, the consideration allowed for the old property must be covered into the Treasury as miscellaneous receipts and the full value of the new supplies charged to the appropriation therefor, the proposed plan would not come within that requirement, the old property not being turned in on the basis of its value but in pursuance of an agreement of warranty; that such a plan appeared to be a sound business arrangement, which would result in economy to the Government, and no legal objection could be perceived to its adoption.

(76-743, J. A. G., Nov. 10, 1914.)

COURTS-MARTIAL: Member of court as witness for the prosecution.

It was provided by the act of March 2, 1913 (37 Stat., 722), that "The commanding officer of a territorial * * * department * * * may appoint general courts-martial whenever necessary; * * * and no officer shall be eligible to sit as a member of such court when he is the accuser, or a witness for the prosecution."

After the accused, an enlisted man, had been arraigned before a general court-martial and his pleas made of record, the judge advocate announced that a certain member of the court was a witness for the prosecution. The said member replied that he was "a witness to the first specification to which the accused has plead guilty." There being no objection, he remained a member of the court, and was not called to testify for the prosecution.

Held, that as the member neither testified nor qualified as a witness against the accused, and that since the only knowledge he was presumed to have had concerning the charges related to a specification which the accused had removed from the realm of judicial inquiry by his plea of guilty thereto, the said member should not be regarded as a witness within the meaning of the statute.

(30-435, J. A. G., Nov. 19, 1914.)

COURTS-MARTIAL: Eligibility of retired officer on active staff duty to serve as summary court-martial.

A lieutenant, U. S. A., retired, assigned to active duty and directed to take charge of property and funds pertaining to the Quartermaster Corps at Fort Logan H. Roots, Arkansas, where there were present, in addition to himself, one officer of the Medical Reserve Corps and ten enlisted men, requested that the department commander detail him as summary court-martial. Section 1255, Revised Statutes, provides that "officers retired from active service shall be withdrawn from command." By the act of April 23, 1904 (33 Stat., 264), the Secretary of War is authorized to assign retired officers of the Army with their consent to "staff duties not involving service with troops." The Act of March 2, 1913 (37 Stat., 722), provides that—

"The commanding officer of a garrison, fort, * * * may appoint summary courts-martial for his command; but such summary courts-martial may in any case be appointed by superior authority when by the latter deemed desirable: *Provided*, That when but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him."

Held, that under the provisions of Section 1255, Revised Statutes, the retired lieutenant could not exercise command; that he could not be deemed to be present with the command in the sense of the Act of March 2, 1913, in view of the fact that under the provisions of the Act of April 23, 1904, he was not permitted to perform services with troops, and that therefore he was not competent to act as summary court-martial, nor did he have authority to appoint a summary court-martial. *Held further*, That it was within the power of the commanding general to appoint the medical reserve officer as a summary court-martial.

(30-730, J. A. G., Nov. 12, 1914.)

DISCHARGES: Of enlisted men; when staff officers may sign.

The question arose as to whether discharges of enlisted men of the Hospital Corps could be signed by a field officer of the Medical Corps when one was present, in view of the requirements of the 4th Article

of War that "No enlisted man, duly sworn, shall be discharged from the service without a discharge in writing, signed by a field officer of the regiment to which he belongs, or by the commanding officer, when no field officer is present;" and of paragraph 147, Army Regulations, which provides that "A soldier on his discharge from the service, will be given a certificate of discharge signed by a field officer of his regiment or corps, or by the commanding officer when no field officer is present."

Held, that the term "regiment" in the 4th Article of War should be interpreted "regiment or corps"; that the term "field officer," according to lexicographers, denotes rank only, and not duty, signifying "a colonel, lieutenant colonel, or major"; and that therefore whenever an officer of either of such grades of any staff corps or department is present with a command, discharges of enlisted men of that corps or department may be signed by such officer.

(28-512, J. A. G., Nov. 23, 1914.)

HABEAS CORPUS: Expenses of officer and sergeant in producing prisoner in obedience to a writ of habeas corpus issued by a Federal Court.

A lieutenant at Fort H. G. Wright, New York, applied to the War Department for reimbursement of expenses incurred by himself and a sergeant in connection with the return to a writ of *habeas corpus* directed to the said lieutenant by a Federal District Court for the production of a soldier then a garrison prisoner whose mother sought his discharge from the Army on the ground of minority enlistment. The officers of the court held that there was no authority to compel the relator to pay the expenses, nor for the Department of Justice to pay them. No regular mileage orders were issued, but the lieutenant's commanding officer directed that he make return to the writ, and that the prisoner be taken under guard.

Held, that paragraph 999, Army Regulations, directing that a writ of *habeas corpus* issued by a United States court or judge shall be promptly obeyed is a recognition of the duty of the military to the United States Courts; that the lieutenant's custody of the prisoner and his duties as respondent in the case resulted from the military office he held; that his duty to produce the prisoner in court was, therefore, a military duty; that it was a military necessity to place the guard over the prisoner during the travel, and that as regular military orders might properly have been issued, the lieutenant's mileage should be approved and reimbursement made for the necessary travel expenses of the sergeant and prisoner.

(20-414.1, J. A. G., Nov. 17, 1914.)

OATHS: Authority of postmasters to administer oaths in respect to officers' returns of contracts to the Department of the Interior.

By Section 8 of the Sundry Civil Act of August 24, 1912, it was provided that—

"After June thirtieth, nineteen hundred and twelve, postmasters, assistant postmasters * * * are required, empowered, and authorized, when requested, to administer oaths, required by law or

otherwise, to accounts for travel or other expenses against the United States, with like force and effect as officers having a seal."

Held, that the authority of postmasters to administer oaths was limited to accounts for travel or other expenses against the United States, and that they were not authorized to administer the oath required by Section 3745, Revised Statutes, relating to officers' returns of contracts to the Department of the Interior.

(64-219.2, J. A. G., Nov. 9, 1914.)

PRIVATE DEBTS: Officer availing himself of bankruptcy law to escape payment of.

A retired officer of the Army became deeply involved in debt. He went into bankruptcy and claimed to have no assets. There were evidences to show that he failed to make the proper effort to discharge his financial obligations; that although he was able to work he did nothing to earn money, and was dependent upon his salary of \$116.87 per month as an officer of the Army. One of his creditors expressed the view that the War Department should not approve of the officer's method of disposing of his obligations through bankruptcy proceedings.

Held, that the discharge of an officer of the Army from his financial obligations by a court of bankruptcy does not release him from the moral obligation imposed by the military code of honor to pay his just debts; that the military code of honor forbids an officer to release himself from his just debts in any other manner than by payment or adjustment satisfactory to his creditors, and that an officer is triable for conduct unbecoming an officer and a gentleman for not paying such debts, providing his failure to do so is attended by circumstances indicating an intention to evade their payment.

(74-224, J. A. G., Oct. 31, 1914.)

RETIRED OFFICERS: Assigned to active duty; authority to command enlisted men.

Section 1255, Revised Statutes, provides that officers retired from active service shall be withdrawn from command, and the act of April 23, 1904 (33 Stat., 264), provides that—

"The Secretary of War may assign retired officers of the Army, with their consent, * * * to staff duties not involving service with troops."

Held, that in view of these statutory provisions, a retired officer assigned to duty as an acting quartermaster at a post had no authority to exercise command over enlisted men; that Paragraph 19, Army Regulations, which provides that—

"* * * any staff officer, by virtue of his commission, may command all enlisted men like other commissioned officers" could not be interpreted as contravening the statutes, but that the command of all enlisted men referred to should be understood to mean that command or authority which officers exercise over enlisted men by virtue of their commission when urgent necessity so requires for the preservation of good order and military discipline.

(88-603, J. A. G., Nov. 21, 1914.)

SENTENCE: Of military court-martial imposed upon private, Marine Corps; remission of unexecuted portion after command transferred back to Navy Department.

A private of the Marine Corps had been tried by a military court-martial and given a disciplinary sentence. Before the sentence had been fully executed, the command to which the said private belonged was transferred back to the jurisdiction of the Navy Department, and it was desired that the unexecuted portion of his sentence be remitted.

Held, that the established rule of the War Department, recognized in paragraph 944, Army Regulations, was that the power of an officer to mitigate a sentence ceased when the person passed beyond the officer's jurisdiction, and that the principle applied *a fortiori* where the person had passed from the jurisdiction of the War Department. *Advised* that no reason was perceived why the Secretary of the Navy, as a representative of the President, could not remit the unexecuted portion of the sentence.

(30-840, J. A. G., Nov. 9, 1914.)

TAXATION: Of Government agencies by States; license and fees for operation of Government automobile.

Vouchers were presented for the payment to the Commissioner of Motor Vehicles for the State of New Jersey of \$3.75 for registration fee for a Government automobile used at Picatinny Arsenal, New Jersey, and \$2.00 for chauffeur's license for the operation of said automobile. The automobile was used by the War Department exclusively in the performance of Governmental functions.

Held, that the vouchers did not represent a proper charge against the United States, as the instrumentalities whereby the Federal Government performs its functions are not subject to State taxation. (15 Comp. Dec., 231.)

(90-125, J. A. G., Nov. 16, 1914.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

CONTRACTORS: Liability for failure to deliver supplies under agreement represented by proposal and award.

Prior to July 1, 1914, Miller, Clagett & Company, in response to advertisement by the Secretary of the Treasury under Act of June 17, 1910 (36 Stat., 531), submitted proposals for furnishing to the several Government establishments and departments in Washington, D. C., as required during the fiscal year 1915, various kinds of groceries. About July 1st, they were awarded the contract for many of the items, and a formal contract and bond were sent them for execution, which they failed or refused to execute. During October, the Government Hospital for the Insane ordered from them, and they delivered, supplies valued at \$1,991.89, according to prices in their accepted proposal. Thereafter, from the latter part of October, owing to the great rise in the price of groceries, they declined to fill

most of the orders sent them, necessitating the purchase of such needed supplies in the open market. On November 24th, they were declared in default by the Secretary of the Treasury, and all departments, etc., were instructed to purchase in the open market, by competitive bid, all needed supplies covered by that Company's proposal, and to report the excess cost as an indebtedness of said contractors. The disbursing clerk of the Government Hospital for the Insane presented to the Comptroller vouchers in favor of Miller, Clagett & Company for \$1,991.89 representing the purchases mentioned above, and inquired whether it should be paid.

Held, That the acceptance of Miller, Clagett & Company's proposal and the placing, acceptance and filling of orders thereunder constituted, under the circumstances, a good and valid contract, binding alike on them and on the Government; that such acts were sufficient to indicate that the parties regarded and intended the proposal and acceptance to constitute a binding contract; that the acceptance by Miller, Clagett & Co., of benefits as of a binding contract effectually estopped them to deny that there was a contract in fact; that consequently they were liable in damages to the extent of the increased cost to the Government of supplies covered by the award to them, and that the voucher in question should be withheld until the final determination of the contractor's liability to the Government.

(Comp. Geo. E. Downey, Nov. 30, 1914.)

PAY AND ALLOWANCES: Of soldier dishonorably discharged; forfeiture of, during suspension of sentence.

A private in the C. A. C. was, upon conviction by a general court-martial, sentenced—

"To be dishonorably discharged the service of the United States, forfeiting all pay and allowances due him, and to be confined at hard labor at such place as the reviewing authority may direct for six (6) months."

On July 13, 1914, the reviewing authority remitted two months of the confinement and directed the suspension of that portion of the sentence imposing dishonorable discharge until the soldier's release from confinement unless sooner ordered by competent authority. Thereafter, by order of competent authority, the suspension of dishonorable discharge was vacated and the soldier dishonorably discharged September 23, 1914. The question was presented whether the soldier was entitled to be paid pay and allowances from July 14, the date of approval of his sentence, to September 23, the date of his discharge.

Held, that the forfeiture of pay and allowances was an incident of the discharge, effective at the time of discharge and not at the time of sentence; that its operation was as if the sentence in this respect had been forfeiture of pay and allowances *due and to become due*, and that therefore pay and allowances due the soldier at the time of his dishonorable discharge on September 23, 1914, were not payable to the soldier, but were forfeited under the sentence.

(Comp. Geo. E. Downey, Nov. 20, 1914.)

TRANSPORTATION: Of Organized Militia in connection with joint encampment with Regular Army; deductions under land grant acts.

The Court of Claims in *Alabama Great Southern Railroad v. United States*, May 18, 1914, No. 31872, rendered judgment for the claimants for \$2,447.90, which sum had been deducted by the Auditor for the War Department from claims of said railroad company for the transportation of members of the organized militia of Alabama and Mississippi to and from the joint camps of instruction of the Regular Army and organized militia held at Chickamauga Park, Ga., in the summers of 1908 and 1910, the amount so deducted being the amount authorized in accordance with the land grant acts and subsequent laws and decisions thereon to be deducted for the transportation of troops of the United States. The decision of the Court of Claims in this case was adverse to the ruling of the Comptroller in 16 Comp. Dec., 70, to the effect that the Organized Militia, when traveling for participation in joint encampment with the Regular Army is to be regarded as "troops" within the meaning of the Statutes relating to land grant deductions from regular rates for transportation of troops over certain railroads. The Department of Justice decided not to take an appeal to the Supreme Court from the judgment of the Court of Claims.

Held, that while the decision of the Court of Claims is not necessarily binding on the Comptroller in handling other cases of the same kind, yet his office would acquiesce and relieve claimants in this class of cases of the necessity of going to the Court of Claims, in view of the conclusion of the Department of Justice that the point involved ought not to be further contested and the fact that the Court of Claims would doubtless adhere to its decision in other like cases presented to it.

(Comp. Geo. E. Downey, Nov. 20, 1914.)

BULLETIN 1.

(Bulletin No. 52 is the last of the series for 1914.)

BULLETIN }
No. 1. }

WAR DEPARTMENT,
WASHINGTON, *January 15, 1915.*

The following digest of opinions of the Judge Advocate General of the Army for the month of December, 1914, and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2246184, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

A. L. MILLS,
Brigadier General, General Staff Corps,
Acting Chief of Staff.

OFFICIAL:

H. P. MCCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ARMY RESERVE: Eligibility of soldiers in Army Reserve to be examined for commission.

By the Act of July 30, 1892 (27 Stat., 336), it was provided "that all unmarried soldiers under thirty years of age, who are citizens of the United States, are physically sound, who have served honorably not less than two years in the Army, and who have borne a good moral character before and after enlistment, may compete for promotion under any system authorized by this Act."

Held, that this provision applied to soldiers in the Army Reserve created by the Act of August 24, 1912 (37 Stat., 590), as well as to soldiers on duty with their organizations.

(64-212.1, J. A. G., Dec. 7, 1914.)

BURIAL EXPENSES: Of indigent ex-Union soldiers dying in the District of Columbia.

An ex-Union soldier died in the District of Columbia in April, 1914, leaving no property. His widow received \$1,933.77 from a policy of insurance on his life made payable to her. She paid the expenses of his burial in Arlington National Cemetery, amounting to \$113, and afterwards made application for reimbursement of \$45 from the appropriation for "Burial of Indigent Soldiers" (Sundry Civil Act, approved June 23, 1913, 38 Stat., 31), which provided for the payment, not to exceed \$45 in each case, of the expenses for

the burial in Arlington National Cemetery, or in the cemeteries of the District of Columbia, of indigent ex-Union soldiers, sailors or marines dying in the District of Columbia.

Held, that life insurance not payable to the estate of the deceased is not a part thereof, and that the question as to whether the ex-Union soldier died indigent within the meaning of the Act of June 23, 1913, was not affected by the receipt of his life insurance by his widow.

(5-244.1, J. A. G., Dec. 9, 1914.)

CONTRACTS: Claim of contractor for extras not agreed upon in writing.

A contractor for the construction and repair of a wharf, after completion of the work and receipt of payment of the contract price, put in a claim for replacing two new fender piles that had been damaged by a government boat in making a landing while the construction work was in progress, and which were found to be defective. The quartermaster in charge, upon consideration of the terms of the contract providing for the replacing of defective piles and specifying that the contractor should cause no inconvenience to the landing of government boats, required that the piles be replaced as part of the contract. While the contractor demurred that it was not within the contract, he acquiesced in the requirement of the quartermaster and performed the work without previous written orders, or agreement as to the price, as provided by the contract for extras.

Held, that the decision of the Court of Claims in *Kilmer v. United States* (48 Ct. Cls., 180), was controlling, in which decision the court said (p. 194):

"In the case of *Ripley v. United States*, *supra*, the court held that in the absence of some provision in the contract therefor a contractor was not required to appeal. That ruling applies to the present case, and the final question therefore is, was the decision of the officer requiring the work to be done without a written agreement final? The contract does not in terms so provide. But it does provide that 'no allowance shall be made for extra work claimed to have been done unless provided for beforehand by a written agreement specifying the cost of the same.' Force and effect must be given to this provision, especially since there is no other provision of the contract or specification modifying the same or in conflict therewith."

(76-741, J. A. G., Dec. 31, 1914.)

DETACHED SERVICE: Promotion while on staff duty.

A first lieutenant of cavalry while on duty in the field with his troop was, on October 7, 1914, detailed to perform additional duty as an acting adjutant of troops of his regiment, and on October 24, 1914, accepted a commission as captain of cavalry when he ceased to do duty as an officer of the cavalry troop but remained on duty as acting adjutant in the field.

Held, that the officer was after October 24th, and until he became assigned to and entered upon duty with a troop of cavalry, on detached service within the meaning of the law governing detached

service, and that he did not come within the special rule provided by the Act of April 27, 1914 (Public No. 91, p. 8), making exceptions to the requirements of the general detached service legislation. (6-124, J. A. G., Dec. 17, 1914.)

DISCHARGES: Revocation of dishonorable discharge; insanity.

The Superintendent of the Government Hospital for the Insane advised the War Department in respect to two prisoners confined in that institution that he had come to the conclusion, after an investigation of the history of the cases, that both of the men were insane at the time they committed the offenses which led to their dishonorable discharge from the Army, and he suggested the substitution in each case of an honorable discharge on certificate of disability for the dishonorable discharge. The issue of insanity was not raised at the trial of the men, and they were regularly convicted by competent courts-martial. The sentences were duly approved by the reviewing authorities, and had been fully executed.

Held, that the soldiers having been legally tried and sentenced and the sentences fully executed, it was beyond the power of the Executive to substitute honorable discharges for the dishonorable ones. (Dig. Op. J. A. G., 1912, p. 456.) (28-620, J. A. G., Dec. 18, 1914.)

ENLISTMENT: Antedating; continuous service pay.

By the Act of May 11, 1908 (35 Stat., 109), authorizing continuous service pay for honorably discharged soldiers who reenlist within three months after their discharge, it was provided that if an honorably discharged soldier reenlists after the expiration of three months he is to be regarded as in his second enlistment where his discharge was from his first or any subsequent enlistment. On June 19, 1914, a soldier was given an honorable discharge from his third continuous enlistment. On August 25, 1914, he applied at Kansas City, Mo., for reenlistment, was deemed qualified and was forwarded to the recruit depot at Jefferson Barracks, Mo., on the same date, but was there rejected on August 27th, on account of flat foot. He applied at Fort Leavenworth, Kans., September 24, 1914, and was accepted and sworn in on that date, three months and five days after his discharge.

Held, that the soldier's enlistment could not be antedated so as to give him the benefit of fourth enlistment pay, his case not coming within the provisions of Par. 859, Army Regulations, which authorize the antedating of an enlistment where the delay was "through no fault of the soldier but for the convenience of the Government."

(34-042, J. A. G., Dec. 12, 1914.)

HORSE SHOWS: Participation of troop of Cavalry in horse show.

In the Army Appropriation Act of April 27, 1914 (Pub. No. 91, p. 15), it was provided that no part of any appropriation shall be expended for traveling expenses of officers, enlisted men or horses

in attending or taking part in horse shows or horse races with the qualification that—"nothing in this proviso shall be held to apply to the officers, enlisted men, and horses of any troop, battery, or company which shall, by order or permission of the Secretary of War, and within the limits of the United States, attend any horse show or any State, County, or Municipal fair, celebration, or exhibition."

Held, that the purpose of the provision was to prohibit the use of public funds for paying expenses for participation in horse shows, fairs, etc., except when the participation is organizational, and that there was no legal objection to permission being given by the Secretary of War for the order of the band and the entire troop of the 10th Cavalry to attend the New York Red Cross Horse Show, as requested.

(94-231, J. A. G., Dec. 2, 1914.)

MILITIA: Purchase of military supplies.

A lieutenant of a State Militia desired to purchase from the Engineer Corps, U. S. Army, a cavalry sketching board for use in instructing a militia cavalry troop.

Held, that Section 17 of the Act of January 21, 1903 (32 Stat., 778), was authority for making the sale of such articles for the use of militia troops, "at the price at which they are listed for issue to the Army, with the cost of transportation added," but that the request should be signed by the Governor of the State or by some one purporting to act by his authority.

(80-150, J. A. G., Dec. 2, 1914.)

POST EXCHANGE: Internal revenue tax.

By the Act of October 22, 1914, commonly known as the war revenue act, it was provided that—

"Dealers in tobacco * * * whose annual receipts from the sale of tobacco exceed \$200 shall each pay \$4.80 for each store, shop, or other place in which tobacco in any form is sold."

Held, that post exchanges, being Government agencies, are not required to pay the tax. (*Dugan v. United States*, 34 Ct. Cls., 458.)

(40-100, J. A. G., Dec. 30, 1914.)

The Act of October 22, 1914, commonly known as the war revenue act, enumerates in Schedule B various articles under the heading, "Perfumeries and cosmetics and other similar articles," which are required to have affixed thereto, on each container, an adhesive internal revenue stamp of the prescribed denomination, and further provides that such articles in the hands of dealers on and after December 1, 1914, shall be subject to the tax, but that "it shall be deemed a compliance with this Act as to such articles in the hands of dealers on and after December as aforesaid who are not the manufacturers thereof to affix the proper adhesive tax stamp at the time the packet, box, bottle, pot, or phial, or other inclosure with its contents is sold at retail."

Army of Mexico, and party, and to return upon completion of such duty to their proper station. The enlisted men were furnished transportation and subsistence by the Quartermaster's Department, the officer paying his own expenses. By the Act of June 12, 1906 (34 Stat., 345), it was provided that officers, when traveling under competent orders without troops shall be paid mileage; and by Par. 1281, Army Regulations, it was provided that the term "traveling with troops" would not be regarded as covering cases of officers included in the movement by railroad of detachments of less than 10 armed or unarmed men, such as "escorts for Inspectors, Quartermasters and others."

Held, that the word "others" in the clause "escorts for Inspectors, Quartermasters and others," Par. 1281, Army Regulations, should not be understood as referring only to those in the military service of the United States, and that the officer was entitled to mileage as having performed travel without troops within the meaning of the regulation and statute.

(94-210, J. A. G., Dec. 12, 1914.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

CONTRACTS: Written proposal and acceptance; transportation rates.

About the 1st of January, 1912, the Quartermaster's Department accepted the tenders of various western railroads for carrying freight destined to Manila at rates considerably less than those available to the general public. About the 1st of January, 1914, the railroads involved put into effect a new export tariff providing rates to the general public on freight destined to Manila in most cases under the Government contract rate. The question was presented whether for Government freight carried after the new tariff went into effect the settlement of pending claims should be made in accordance with the contract rates or in accordance with the new tariff rates where they were lower than the contract rate.

Held, that in respect to the reduction in rates the agreements were not for that reason invalid, as they were, when made, advantageous to the Government; that it is axiomatic that a contract valid when made remains effective until its expiration notwithstanding fluctuations that might happen afterwards; that the agreements were invalid, however, because not made in accordance with the provisions of Section 3744, Revised Statutes, but in so far as they had been performed their invalidity was immaterial (*United States v. Andrews Co.*, 207 U. S., 229; *St. Louis Hay & Grain Co. v. United States*, 191 U. S., 159), and that as both the War Department and the carriers considered the agreements effective, the rates named therein should be applied to all shipments made thereunder and existing accounts settled accordingly. *Held further*, that as the agreements were invalid as executory contracts no notice was necessary to terminate them.

(Comp. Geo. E. Downey, Dec. 1, 1914.)

TRANSPORTATION: Discharged soldier using transportation request as part payment of fare on through trip.

A soldier discharged at San Francisco, Cal., and desiring transportation to Somerset, Ky., was furnished a Government transportation request for transportation from San Francisco to Granger, Wyo., the ultimate point in the direction of Somerset, Ky., to which he was entitled to transportation. The railroad company would not accept the request in part payment for a single through ticket to Somerset at the regular through rate, but issued to the soldier a ticket to Granger, Wyo., and another ticket thence to Somerset, Ky., for which the soldier was required to pay the local rate of \$40.53. The value of the transportation from San Francisco to Granger was \$34.40, and the through rate from San Francisco to Somerset was \$53.60. The soldier contended that he should have been allowed the money value of his transportation request toward the payment of the through rate of \$53.60 and required to pay only the balance, or \$19.20. In a decision of August 14, 1914 (21 Comp. Dec., 76), the Comptroller held in substance that in honoring transportation requests issued to discharged enlisted men, a transportation company must adhere to the stipulations upon the requests by issuing transportation of the character specified therein and between the points named.

Held, that the railroad company, in taking up the transportation request and issuing a ticket thereon to the destination called for, did only what it was requested to do by the Government, and that the Comptroller had no jurisdiction to render an authoritative decision as to the right of the railroad company under the circumstances to collect from the soldier more than the regular through rate.

(Comp. Geo. E. Downey, Dec. 8, 1914.)

BULLETIN 5.

BULLETIN }
No. 5. }

WAR DEPARTMENT,
WASHINGTON, *February 6, 1915.*

The following digest of opinions of the Judge Advocate General of the Army for the month of January, 1915, of certain decisions of the Comptroller of the Treasury, and of an opinion of the Attorney General, is published for the information of the service in general.

[2255370, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Brigadier General, Chief of Staff.

OFFICIAL:

H. P. MCCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ACTING DENTAL SURGEONS: Not officers of the Army.

The question was presented as to whether an acting dental surgeon is an officer of the Army, within the meaning of the Act of March 3, 1885 (23 Stat., 350), authorizing the reimbursement of officers and enlisted men for the value of private property lost or destroyed in the military service. Acting dental surgeons occupy the same official status as contract dental surgeons (36 Stat., 1054), and contract dental surgeons have the same official status as contract surgeons (31 Stat., 752).

Held, following previous rulings of this office in respect to contract surgeons (Dig. Op. J. A. G., 1912, p. 97), that acting dental surgeons are not officers of the Army, within the meaning of the Act of March 3, 1885; that they form no part of the military establishment, but are merely civilians under contract to render personal service.

(18-461, J. A. G., Jan. 11, 1915.)

CIVILIANS: Expenses for treatment of, in Government hospital.

A transport surgeon at San Francisco, Cal., after rejecting, on October 1, 1914, a temporary employee as physically unfit for the transport service and therefore ineligible to sign the ship's articles, and after the latter's employment of about two weeks as water tender on the transport had ceased, gave him a letter, dated October 5, 1914, to the Letterman General Hospital, stating that "bearer . . . is an employee of the transport service, who desires treatment for

hernia . . .” Subsequently a claim was presented to the Medical Department on behalf of the hospital fund for reimbursement of \$10.40 for the patient’s subsistence while under treatment at the hospital from October 6 to 31.

Held, that the patient having ceased to be an employee of the transport service before his admission to the hospital and the disability for which he was treated having antedated his service, there was no provision of law or regulation authorizing the payment of the said expenses from public funds. *Held further*, that the hospital fund was entitled to reimbursement and that as the transport surgeon seemed to be responsible for erroneously causing the patient’s admission into the hospital as an employee of the transport service, he should be held liable for the payment of the claim.

(94-120, J. A. G., Jan. 12, 1915.)

CONTRACTS: Failure to accept bid within stipulated time limit; liability of guarantors.

Bids were invited and opened July 16, 1914, for the construction of 315 refrigerators. The bids were accompanied by guaranties to keep the bids open for acceptance for sixty days, and in default of the bidder to enter into contract in event of the acceptance of his bid within the sixty day period the guarantors were bound to pay to the United States the difference in cost, if any, in case of purchases elsewhere. The award was made, but not within the sixty-day period, and subsequently the successful bidder was adjudged a bankrupt and became unable to carry out the agreement.

Held, that the failure to accept the bid within the sixty-day period absolved the guarantors from all liability. *Held, further*, that there was no legal objection either to readvertising for new bids or to entering into a contract with the next lowest bidder if the latter were willing.

(76-240, J. A. G., Jan. 15, 1915.)

CONTRACTS: Liability of guarantors for failure of successful bidder to enter into and perform contract.

A bid for furnishing horses, dated November 2, 1914, accompanied by a guaranty to enter into a contract, as required, within five days after notice of acceptance, was accepted and contract and bond were sent to the bidder on November 20, 1914, for execution, which he failed or refused to accomplish. He proceeded, however, to deliver horses for inspection, and up to January 18, 1915, when the time limit for furnishing horses expired, he had produced about ninety animals, out of which number only nine were found acceptable. The bidder asked to be relieved from his obligation.

Held, that the condition of the guaranty was broken by the failure of the bidder to enter into contract, as required, “within five days after said notice of acceptance,” and that his guarantors were bound, to the extent of their undertaking under the terms of the guaranty, to pay to the United States the difference, if any, in money between

the amount of the bidder's proposal and the cost to the United States of the horses purchased elsewhere.

(76-600, J. A. G., Jan. 23, 1915.)

CONTRACTS: Failure of subject matter of contract due to act of God.

A contract for furnishing hay at a post in Texas called for choice prairie feeding hay, the highest of the locality. Owing to a severe drought, followed by heavy rains and floods, the quality of the Texas crop of prairie hay was very poor, but the quartermaster accepted deliveries of the inferior hay, described as "a poor grade of prairie grass, overcured, lifeless," and containing "little nutriment," paying therefor the contract price, on the ground that there was no better hay to be had in the open market.

Held, that the contractor was not entitled to substitute an inferior quality of hay for the superior article called for by the contract; that if there was a failure of the subject matter of the contract, due to an act of God, he was entitled to have the contract canceled without liability to either party, and that if conditions required the purchase of inferior hay, either because a better quality could not be procured or because the emergency did not permit of the necessary delay to procure it, the inferior article should have been purchased at the market price. *Held further*, that the opinion of this office of August 31, 1913 (W. D. Bul. No. 29, 1913, p. 7), upon which the quartermaster relied, was misconstrued by him.

(76-700, J. A. G., Jan. 9, 1915.)

COURTS-MARTIAL: Publication of sentence.

A general prisoner was received at Fort Leavenworth, Kans., September 5, 1914, under sentence of confinement at hard labor for six months. A *typewritten* copy of the general court-martial order publishing the prisoner's sentence, dated August 14, 1914, accompanied the prisoner, under which order the term of confinement, with reduction for good conduct time, would expire January 12, 1915. About two months later a *printed* copy of the general court-martial order, dated September 21, 1914, publishing the same sentence was received at the prison, under which the prisoner's sentence would expire not earlier than February 23, 1915. The latter order contained the printed notation: "This order supersedes typewritten order publishing this case."

Held, that the first order legally completed the action of the reviewing authority, and that the subsequent order was null and void.

(80-540, J. A. G., Jan. 9, 1915.)

EXTRADITION: Transfer of enlisted man to another State for prosecution by civil authorities.

Request was made that an enlisted man serving in Delaware be transferred into the jurisdiction of New York with a view to having him indicted for abandoning his wife. *Held*, that there is no provision of law for the transportation, at the expense of the United

States, to the place where he is wanted by the civil authorities, of a soldier charged with an offense, but that a soldier is, in respect of extradition process, in the same status as though he were in civil life. (74-111.3, J. A. G., Jan. 26, 1915.)

HEAT AND LIGHT: Noncommissioned officer on temporary duty in the field not entitled to fuel allowance at his permanent station.

A regimental noncommissioned staff officer, on temporary duty with his regiment at Texas City, Tex., and entitled to one room as quarters, requested that his allowance of fuel be issued to his family at his permanent station. The Act of March 2, 1907 (34 Stat., 1167), provides for the allowance of heat and light for the authorized allowance of quarters for officers and enlisted men.

Held, that there is no statutory authority for an enlisted man to retain quarters at his permanent station while on temporary duty in the field, similar to that provided for officers by the Act of February 27, 1893 (27 Stat., 480), and that, therefore, the noncommissioned officer was entitled to his fuel allowance only at his place of service, where only he was entitled to quarters.

(72-411, J. A. G., Jan. 14, 1915.)

HEAT AND LIGHT: Pay clerks.

The question was presented whether a pay clerk, duly assigned to and occupying public quarters at a military post, is entitled to heat and light at public expense under the Act of March 2, 1907 (34 Stat., 1167), which provides for the furnishing of heat and light actually necessary for the authorized allowance of quarters for officers and enlisted men.

Held, that the pay and allowances of pay clerks of the Army are by statute (Act of Mar. 3, 1911, 36 Stat., 1044; and Act of June 24, 1910, 36 Stat., 606) made the same as paymasters' clerks and warrant officers of the Navy; that by the Act of March 3, 1901 (31 Stat., 1107), and section 1616, Revised Statutes, the latter are given the same allowances of quarters as are provided for a 2d lieutenant of the Army, but that no statutory provision is made for furnishing heat and light for their quarters at public expense.

(72-310.1, J. A. G., Jan. 20, 1915.)

PRIVATE BUSINESS: Officers engaging in.

A typewriter company inquired whether it was within the province of captains, lieutenants, sergeants, etc., to sell typewriters to their "fellow officers" on commission. *Held*, that such a practice would not receive the favorable indorsement of the War Department.

(6-127, J. A. G., Jan. 18, 1915.)

QUARTERS: Officer in command of disciplinary company, military prison.

By the Act of March 2, 1901 (31 Stat., 901), it is provided that the Secretary of War may determine what shall constitute travel and

duty without troops within the meaning of the laws governing the payment of mileage and commutation of quarters to officers of the Army. Under authority of this statute, the Secretary of War prescribed Paragraph 1300, Army Regulations, 1913, which provides, *inter alia*, that officers on duty at places where public quarters are not furnished, "but where enlisted men are on duty only as guards, orderlies, clerks, and messengers," are regarded as being on duty without troops.

An officer was placed in command of the disciplinary company, in addition to other duties, at the Atlantic Branch of the United States Military Prison, Fort Jay, N. Y., said company consisting of about 80 men sentenced to dishonorable discharge. In addition there were 20 enlisted men performing the duties of instructors and overseers of the prisoners.

Held, that none of the prisoners was serving the United States under an enlistment contract, but all were serving confinement under sentence and were, therefore, not troops; that the 20 enlisted men performed some guard duty, but were mainly employed as instructors and overseers; that they were not "on duty only as guards," nor employed as orderlies, clerks or messengers, and that the officer was not, in the sense of the regulation, on duty without troops.

(72-333, J. A. G., Jan. 12, 1915.)

TRAVEL ALLOWANCES: Discharged soldiers; transportation in kind furnished and not used.

An enlisted man, honorably discharged at Fort McDowell, Cal., from an enlistment effected in the Philippine Islands, was, upon his request, given a Government transportation request for transportation in kind from San Francisco, Cal., to Baltimore, Md., in accordance with the Act of August 24, 1912 (37 Stat., 576), which provides that an honorably discharged soldier shall be entitled to transportation in kind and subsistence from the place of his discharge to the place of his enlistment, or to such other place within the continental limits of the United States as he may select, to which the distance is no greater than from the place of discharge to the place of enlistment. The act further provides that in lieu of such transportation and subsistence, the soldier may elect to receive two cents a mile except for sea travel. The soldier changed his mind and reenlisted at Fort McDowell, returning the transportation request to the quartermaster. He then inquired whether he was not entitled to receive in money, from the Government, the amount that the transportation to Baltimore would have cost the Government had he used it.

Held, that the soldier was only entitled to transportation in kind because his rights were based upon sea travel, and this was so whether he returned to the Philippines, the place of his enlistment, or journeyed in the opposite direction, and that the law makes no provision for commuting to soldiers the value of transportation in kind where they are not entitled to the regular statutory two cents a mile allowance.

(94-330, J. A. G., Jan. 23, 1915.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

PURCHASE OF SUPPLIES: Requirements as to advertising.

The Bureau of Mines purchased a gasoline truck after advertising and receiving five proposals for furnishing the truck in accordance with specifications. Subsequently, the need for another truck of the same character having arisen, the bureau purchased a second truck from the same company that furnished the first, at the same price. It was certified on the voucher for payment that the truck was purchased "under informal agreement, upon immediate delivery or performance," and upon "non-competitive quotation without advertising, by reason of impracticability to secure competition," there being, it was stated, "only one dealer from whom the articles can be obtained."

Held, that the certificate was not justified by the facts; that when the first truck was required five separate proposals were obtained for furnishing it, which showed that there was no lack of competition; that it cannot be concluded by one purchasing for the Government that a particular *make* of a needed article will be purchased, when other makers can furnish substantially the same article, and then from such conclusion adopt the further one that it is not possible to secure competition; that the requirements of Section 3709, Revised Statutes, as to advertising, are mandatory except where immediate delivery is urgent; and also that Section 3744, Revised Statutes, requiring all contracts of the War, Navy and Interior Departments to be reduced to writing and signed at the end thereof, should have been complied with.

(Comp. Geo. E. Downey, Jan. 6, 1915.)

STATE LAWS: Inspection of horses belonging to the United States at State lines.

The Southern Pacific Company put in a claim for reimbursement of \$60.40 for cost of inspection of horses belonging to the United States en route from various points to California and Arizona. It was contended that the State laws required the inspections to be made before the admission of the horses into the States; that it was the duty of the carrier to permit and pay for such inspection in order to facilitate the prompt delivery of the shipment to the consignees, and that the law requiring such inspection was within the police power of the States.

Held, that the police power of a State to safeguard the health and property of its inhabitants does not extend to the right of interfering with the instrumentalities of the Federal Government; that the requirement of the State laws of evidence of the inspection of the horses did not make it the carrier's duty to make or permit the inspection; that the expenses were, therefore, voluntarily incurred without benefit to the United States, and that the carrier could not legally be reimbursed from public funds.

(Comp. Geo. E. Downey, Jan. 14, 1915.)

OPINION OF THE ATTORNEY GENERAL.

(Digest prepared in the office of the Judge Advocate General.)

CONTRACTORS: Relief from performance of contract because of increased cost of contract supplies due to European war.

A firm which entered into a contract before the outbreak of the European war to furnish supplies to the Treasury Department petitioned the Secretary of the Treasury for relief from further performance of their contract because of the increased price of contract supplies due to the war. *Held*, that the contractors were obligated to perform the contract, if valid, if performance were physically possible; that the existing hardship gave them no right to avoid the obligation; that no executive officer has power to suspend, rescind or relieve from the obligation of a valid contract when either would be detrimental to the United States, however burdensome performance might be—especially where the added burden is not caused by the United States, and that in such cases relief can only be granted by Congress, which body alone has power to recognize a moral claim for relief.

(30 Ops. Atty. Gen., 301.)

BULLETIN 9.

BULLETIN }
No. 9. }

WAR DEPARTMENT,
WASHINGTON, *March 13, 1915.*

The following digest of opinions of the Judge Advocate General of the Army for the month of February, 1915, and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2255370 A—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

TASKER H. BLISS,
Brigadier General, Acting Chief of Staff.

OFFICIAL:

H. P. MCCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

CONTRACTS: Change in statutory requirements as to form.

In a decision of December 31, 1914 (21 Comp. Dec., 425), the Comptroller of the Treasury held that under Section 3744, Revised Statutes, contracts generally for the purchase of supplies or procurement of services for the Army were required to be reduced to writing and signed by the contracting parties at the end thereof, except as to emergency purchases, or where the amount for supplies or services did not exceed \$500 and immediate performance was contemplated. The effect of this decision is modified by the following provision of the Army Appropriation Act, approved March 4, 1915 (Pub. No. 292):

"That *hereafter* whenever contracts which are not to be performed within sixty days are made on behalf of the Government by the Quartermaster General, or by officers of the Quartermaster Corps authorized to make them, and are in excess of \$500 in amount, such contracts shall be reduced to writing and signed by the contracting parties. In all other cases contracts shall be entered into under such regulations as may be prescribed by the Quartermaster General."

The effect of this legislation is to require formal written contracts in the Quartermaster's Department only where the agreement is not to be performed within 60 days and the amount involved exceeds \$500. Formal written contracts will not be necessary (a) where the amount involved does not exceed \$500, or (b) where, regardless of the amount, performance is to be completed within 60 days, unless required by regulations prescribed by the Quartermaster General.

COURTS-MARTIAL: Officers of Judge Advocate General's Department not available as counsel.

A lieutenant applied for the detail of an officer on duty in the office of the Judge Advocate General of the Army to appear as counsel in his defense at a general court-martial trial.

Held, that the Judge Advocate General's Office is on record as being opposed to officers of the Judge Advocate General's Department appearing as counsel for the defense in any case, which principle should be adhered to and should apply to assistants in the office of the Judge Advocate General.

(30-423.3, J. A. G., Feb. 2, 1915.)

DESERTION: Resignation of officer during Civil War.

On October 1, 1861, an officer of the United States Army tendered his resignation at San Francisco, Cal., and in November, 1861, joined the Confederate Army. No record was found of his having been granted any leave, nor of the acceptance of his resignation, but on December 26, 1861, it was announced in General Orders from the War Department that the officer was dismissed on that date by direction of the President because of his having tendered his resignation under circumstances showing disloyalty to the Government.

Held, that in view of Section 2 of the Act of August 5, 1861, providing that an officer leaving the Army under such circumstances "shall be registered as a deserter and punished as such," his status from the date he tendered his resignation and quit the service of the United States with intent to join the Confederate Army until his discharge on December 26, 1861, was that of an officer absent in desertion.

(26-920, J. A. G., Feb. 27, 1915.)

INDIAN SCOUTS: Contracts of enlistment.

The question was presented whether the regular enlistment contract should be used for Indian Scouts. Indian Scouts are enlisted under Section 1112, Revised Statutes, which authorizes the President to enlist a force of Indian Scouts "who shall act as scouts in the Territories and Indian country," and who "shall be discharged when the necessity for their service shall cease, or at the discretion of the department commander."

The Act of February 2, 1901 (31 Stat., 748), provides that the Army "shall consist of fifteen regiments of cavalry, a corps of artillery, thirty regiments of infantry * * *, *Indian scouts as now authorized by law*, and such other officers and enlisted men as may hereinafter be provided for."

The Act of August 24, 1912 (37 Stat., 599), provides for *all enlistments of the Army*, to be made for a term of seven years and subject to the Army reserve provisions of the Act.

Held, that the Act of August 24, 1912, makes no exception as to Indian scouts; that they are placed upon the same footing as other enlisted men of the Army, so far as their enlistment term is concerned; and that therefore the regular enlistment contract is the

only proper contract for their enlistment. *Held further*, that under the provisions of Section 1112, Revised Statutes, Indian scouts may be discharged "when the necessity for their service shall cease, or at the discretion of the department commander," since those provisions have not been repealed.

(6-150.1, J. A. G., Feb. 20, 1915.)

LICENSES: For the erection of buildings on military reservations.

The proprietor of a restaurant on a military reservation applied for insurance on the building in which he conducted his business, and the question was raised as to who held title to the building. The building was erected in 1909 by a restaurant company, with the permission of the post commander. The restaurant company having proved unsatisfactory, the post commander had the value of the building appraised by a board of officers, and it was sold at the appraised valuation. The purchaser subsequently made improvements and additions thereto, with the tacit approval of the commanding officer.

Held, that the question of title to buildings erected upon military reservations under licenses depends in each case upon the intent of the parties; that where licenses have been reduced to writing the question of title is not ordinarily difficult to determine, the general rule in such cases being that unless otherwise provided therein the title may be assumed to be in the licensee; that in the case of verbal licenses or permits, as in the instant case, while the controlling principle is likewise the intent of the parties, such intent is apt to be more difficult to determine, and must be gathered from the statements of the parties and the known circumstances; that in the instant case the fact that the company which erected the building was permitted to sell it indicated that it was the intention of the parties to the license that the title should be in the licensee, and hence the purchaser acquired the vendor's title; such license, however, being revocable and the building subject to removal at the pleasure of the executive authority.

(80-252, J. A. G., Feb. 2, 1915.)

LINE OF DUTY: Enlisted man injured while cleaning pistol.

An enlisted man on duty was injured by the discharge of a Government automatic pistol which he was cleaning preparatory for inspection. He had been on patrol duty and returned about 4.30 p. m. "He then looked after his mount, went to mess and returned to his tent to clean his arms for retreat inspection. He was fully under the impression that he had unloaded his rifle and pistol and found his rifle to be unloaded, which he cleaned first. He then proceeded to clean his pistol and it discharged, injuring him."

Held, that while the soldier was negligent in not assuring himself that his pistol was not loaded before he began cleaning it, under all the circumstances it was not regarded that his failure to do so amounted to culpable contributory negligence; and that his injury

should be regarded as having been incurred in line of duty. *Held further*, that the rule with respect to contributory negligence can not be applied in all its strictness in determining the question whether a soldier's injuries have been received in line of duty, but that injuries caused by gross carelessness are not in line of duty.

(54-013, J. A. G., Feb. 26, 1915.)

MILITARY ATTACHÉS: Expenses for travel as military observer.

The military attaché at Tokyo, Japan, submitted vouchers for mileage for travel performed by him as "military observer" in accompanying the Japanese Expeditionary Campaign against the German province of Kiao-chau, that officer having been directed by the War Department to perform the duty mentioned upon his advice that "the Japanese War Department has authorized one military attaché from each Treaty country to accompany the Expeditionary forces to Kiao-chau."

Held, that the travel came within the provision of the current Army Appropriation Act (38 Stat., 315), "for * * * the actual and necessary traveling expenses incurred by military attachés abroad under orders from the Secretary of War"; that the officer was, therefore, entitled to reimbursement for his actual and necessary traveling expenses, and was not authorized to receive mileage.

(99-270, J. A. G., Feb. 9, 1915.)

POST EXCHANGES: Shortage in accounts; responsibility.

Upon an examination of the accounts of a certain post exchange the Inspector General's Department found a shortage in the accounts for each month for the period from August 1, 1913, to June 15, 1914, aggregating \$655.84. The accounts had not been kept in accordance with the requirements of the post exchange regulations and it was evident that the loss might readily have been detected by proper auditing of the accounts by the members of the post exchange council, as required by regulations. During the period mentioned the post exchange council took no inventory of the stock, notwithstanding the requirements of the regulations that such inventory be taken by them quarterly or oftener.

Held, that post exchanges being agencies of the Government, the duties imposed upon officers in the management of their affairs are as binding upon them as any other duty to which they may be assigned under competent military authority; that when the property or funds of an exchange are lost through mismanagement or neglect of such officers the least that can or should be exacted, in the public interests, is that they make good the loss; that this principle applies as well to members of an exchange council as to the exchange officer; and that in the instant case it was the duty of the Department, in the public interests, to direct the entry of stoppages against the pay of the several members of the exchange council and of the exchange officer, in equal sums, to cover the shortage.

(40-100, J. A. G., Feb. 24, 1915.)

RETIRED OFFICERS: Powers and duties when assigned to recruiting duty.

The question was presented whether a retired officer of the Army detailed to recruiting duty was authorized to administer oaths and execute depositions. Doubt arose because of the opinion of this office of November 14, 1914 (Bull. No. 52, W. D. 1914, p. 4), holding that a retired officer assigned to active duty and detailed as acting quartermaster and directed to take charge of the property and funds pertaining to the Quartermaster Corps at a post, could not be appointed summary court officer for the reason that the law authorizing the detail of retired officers on staff duty requires that it shall not involve "service with troops." The Act of April 23, 1904 (33 Stat., 264), authorizes the Secretary of War to assign retired officers of the Army, with their consent, "to active duty in recruiting" and, among other duties mentioned, to "staff duties not involving service with troops."

Held, that the statutory restriction that staff duty shall not involve service with troops does not apply to recruiting duty; that the language of the statute "active duty in recruiting" means that a retired officer so detailed shall perform the same duty as an officer on the active list so assigned, exercising the same power over and bearing the same relation to enlisted men at the recruiting station; that, being the only officer at a recruiting station, he constitutes the summary court-martial and is competent to administer oaths and execute depositions by virtue of the Act of March 2, 1913, which provides that "when but one officer is present with a command, he shall be the summary court-martial of that command and shall hear and determine cases brought before him."

64-219.22, J. A. G., Feb. 12, 1915.)

TRANSPORTATION: Excess shipments upon change of station.

An officer whose freight allowance upon change of station was 5,100 pounds, in changing stations from Fort Riley, Kans., to Schofield Barracks, H. T., shipped an automobile from San Francisco weighing 2,000 pounds. At a later date he shipped a piano from Fort Riley, Kans., weighing 935 pounds, and still later household goods weighing 5,042 pounds. The total weight of the shipments from San Francisco to Honolulu was 7,977 pounds, and from Fort Riley to Honolulu, 5,977 pounds.

Held, that the officer was chargeable only for the excess shipments as actually made, or for 2,877 pounds from San Francisco, and 877 pounds from Fort Riley, together with the additional expense, if any, incurred by the Government by reason of the excess shipment from San Francisco.

(94-233, J. A. G., Feb. 2, 1915.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the Office of the Judge Advocate General.)

CONTRACTS: Adjustment of mistake made in final payment.

In making final payment to a contractor for engineer supplies there was erroneously deducted as liquidated damages for a supposed delay of three days in making deliveries the sum of \$120. It was

found later that contrary to the contract provisions no account had been taken of a delay of eight days caused by the Government.

Held, that upon the approval by the Chief of Engineers of the finding, "the voucher submitted covering the refund of such deduction may properly be made."

(Comp. Geo. E. Downey, Feb. 8, 1915.)

CONTRACTS: Deliveries of contract supplies after expiration of contract.

A contract was entered into for furnishing 100,000 pounds of bran at a military post during the fiscal year 1914. It contained the usual option in favor of the United States to increase or decrease the quantity to the extent of 20 per cent at any time or times during the continuance of the contract, and that in case of the withdrawal of troops from the post the quantity to be delivered should be modified in accordance with the requirements of the Government. It was further provided that "in case of change, if the quantity required be increased or decreased, notice in writing of such change will be served upon the contractor by the contracting officer." There was delivered during the life of the contract only 54,960 pounds of bran, this being all that was called for by the Government, owing to a material reduction in the garrison. The Government gave the contractor no notice in writing of its intention to reduce the amount to be delivered under the contract, and the contractor for that reason claimed the right to deliver the remainder of the contract quantity at the contract price. Upon the question whether the Quartermaster Department was authorized to accept the bran after the contract had expired and after new contracts were awarded for bran at a lower price,

Held, that the contract expired under its own limitations on June 30, 1914; that after that date the Government could not, as a matter of right, order supplies under the contract any more than the contractor could be compelled to deliver supplies so ordered.

(Comp. Geo. E. Downey, Feb. 6, 1915.)

CONTRACTS: Open market purchases.

A contract was made for furnishing the Government Hospital for the Insane, Washington, D. C., with flour, "as may be required and ordered" during the period July 1, 1914, to October 31, 1914, at \$4.40 per barrel. During July, August, and September there were duly delivered on orders 796 barrels of flour. The hospital having ordered 500 barrels for October delivery, the contractors delivered 250 barrels and declined to deliver more, owing to the fact that the cost of wheat and flour had materially advanced, due to the European war and other causes, and because they considered the order in excess of the actual needs of the hospital for the period covered by the contract. The hospital thereupon purchased in the open market 250 barrels of a similar grade of flour, charging the excess cost, \$387.25, against the contractors.

Held, that the contractors were obligated to furnish the quantity of flour that was ordered to supply the actual and reasonable needs

of the hospital during the contract period; that it was for the hospital authorities to determine those needs; and that any determination of such needs which on its face did not appear to be unreasonable or capricious, or made without due regard for those interests of the contractor which general principles of law would protect and safeguard, would be accepted by the Comptroller as correct and binding upon the contractors; but that, inasmuch as it had been ascertained upon inquiry that during the contract period the hospital actually used only about 1,000 barrels of flour, and since the contractors had delivered 1,046 barrels, they had literally and in fact supplied all reasonable needs of the hospital for the full period covered by the contract, and that they were consequently not liable for the excess cost of the 250 barrels charged against them.

(Comp. Geo. E. Downey, Feb. 13, 1915.)

COURT-MARTIAL SENTENCE: When forfeiture of pay commences to run.

A soldier whose term of enlistment expired March 10, 1914, was retained to await the sentence of a general court-martial, which was promulgated in orders dated March 14, 1914, as follows:

"To be confined at hard labor at such place as the reviewing authority may direct for six months, and to forfeit ten dollars per month for the same period."

The soldier was discharged the service March 20, 1914. He had pay due him from January 1, 1914, and the question was presented whether on his final statements his pay for January and February was subject to a deduction of \$10 per month under the court-martial sentence.

Held, that the proper construction of the court-martial sentence meant that the execution of the forfeiture began with date of confinement, and that if the soldier entered upon his term of confinement under the sentence on March 14, 1914, the date of the promulgation of the sentence, the forfeiture of pay commenced on that date and ceased with his discharge on March 20, 1914, when his pay ceased.

(Comp. Geo. E. Downey, Dec. 31, 1914, and Feb. 6, 1915.)

NOTE.—See G. O. No. 70, W. D., 1914, p. 13, where the authorized form of sentence of forfeiture (in connection with a term of confinement) calls for the forfeiture to be "for a *like* period." Under this form of sentence, the period of forfeiture would begin, as prescribed in paragraph 976, Army Regulations, "*with the period for which pay has accrued since last payment.*"

EXCHANGE: Payment of salaries abroad.

The military attaché at Peking, China, as acting quartermaster for the payment of his own accounts during the period from October 1, 1912, to June 30, 1914, charged against the United States and paid to himself the sum of \$196.04 as the cost of exchange. For example, the officer stated his pay account for a particular month, including all allowances, at \$417.50, which he computed as equivalent to \$852.04, local currency, on the basis of the value of the Mexican dollar in

China, as published by the Treasury Department for customs purposes, and thereupon obtained from the International Banking Corporation at Peking that amount of money in exchange for his draft drawn on the Assistant Treasurer at New York for \$446.91; the difference between the latter sum and \$417.50 being regarded as the cost of exchange.

Held, that the officer was only entitled to his pay as fixed by law in United States Currency; that his check in payment thereof drawn on funds to his official credit should have been for the amount thus due, and that any excess was unauthorized; that while under certain circumstances exchange may be paid in the transaction of the public business abroad, there is no authority for it in the payment of salaries which are fixed by law.

(Comp. Geo. E. Downey, Feb. 6, 1915.)

HEAT AND LIGHT: Furnished family of officer on temporary duty.

An officer whose regular station was Texas City, Texas, was assigned to temporary duty at Vera Cruz, Mexico, during the months of July, August, September, and October, 1914. His family continued to occupy his quarters at Texas City.

Held, that the officer was entitled to have his heat and light allowance furnished to his family at his regular station provided he did not avail himself of such allowance elsewhere.

(Comp. Geo. E. Downey, Jan. 5, 1915.)

NOTE.—The note published on page 6 of Bulletin No. 50, W. D., 1914, should have been inserted on page 11, following the Digest of Comptroller's Decision of October 10, 1914.

BULLETIN 14.

BULLETIN }
No. 14. }

WAR DEPARTMENT,
WASHINGTON, April 12, 1915.

The following digest of opinions of the Judge Advocate General of the Army for the month of March, 1915, of certain decisions of the Comptroller of the Treasury and of the courts, is published for the information of the service in general.

[2255370 B—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Brigadier General, Chief of Staff.

OFFICIAL:

H. P. MCCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ARMY ORDERS: Not revocable after executed.

An officer of the Medical Reserve Corps, after serving on active duty for more than a year, was notified by War Department order that his relief therefrom would take effect upon the arrival of a successor. The officer at the proper time complied with this order directing that he proceed to his home and stand relieved from active duty, but on the same date applied for a month's leave of absence that he had earned and not taken. It was recommended in the officer's behalf that the order directing his relief from active duty be rescinded in order that he might take advantage of the leave that he had earned. The Act of April 23, 1908 (35 Stat., 68), creating the Medical Reserve Corps, prescribes when officers of that corps may be called into active service, and provides for their relief from such duty "when their services are no longer necessary."

Held, that the order having been regular and valid its effect was to relieve the officer from active duty, and that the department had no power to revoke it so as to restore the officer to a duty status.

(2-100, J. A. G., Mar. 15, 1915.)

DESEPTION: Removal of erroneous charge after separation of soldier from the service.

A soldier while under a charge of desertion was discharged from the service of the United States on a surgeon's certificate of disability. The Department Commander subsequently issued an order

setting aside the charge of desertion as having been erroneously made.

Held, that while under paragraph 131, Army Regulations, the authority competent to order the trial of a deserter is competent to set aside the charge of desertion as having been erroneously made, he can not set aside the charge or exercise any administrative function respecting the man's military status after the soldier's separation from the service, when the fact of desertion becomes a matter to be determined by the War Department.

(26-520, J. A. G., Mar. 30, 1915.)

EDUCATIONAL INSTITUTIONS: Cost to students of military supplies purchased from the War Department.

The Act of July 17, 1914 (38 Stat., 512), authorizes educational institutions to which officers of the Army are detailed as professors of military science and tactics to purchase from the War Department for the use of their military students such stores, supplies, matériel of war, and military publications as are furnished to the Army "with the cost of transportation added."

Held, that this statute contemplates that the uniforms for the use of students should be furnished to such students at the War Department price with only the cost of transportation added, and that the educational institution could not properly charge the student with any additional expense to cover storage or the like.

(80-160, J. A. G., Mar. 3, 1915.)

LINE OF DUTY: Accident causing death of soldier absent on hunting pass.

An enlisted man who, with three other soldiers, had been granted a hunting pass, was shot by the accidental discharge of a shot gun in the escort wagon in which the hunting party was returning to their station. The hunting pass covered the period from 10 a. m., December 31, 1914, to reveille, January 4, 1915. Reveille at their station was at 7.15 a. m., and the accident occurred about 7.30 a. m., fifteen minutes after the expiration of the pass, and while the party was thirty-three miles from their station, en route thereto. The soldier died from the wound. There was no evidence that he was intoxicated or that he was guilty of any negligence or misconduct.

Held, that hunting passes as provided for in paragraph 66, Army Regulations, being privileges for the purpose of hunting game, resulting in small arms practice, a soldier's status while so engaged falls within the description of duty in respect of any injuries received from disabilities incurred thereunder; that a soldier when on furlough may be in line of duty when en route to his station at the expiration of his leave (Dig. Op. J. A. G., 1912, p. 688), and that in the instant case the soldier's death should be considered as having occurred in line of duty.

(54-020, J. A. G., Mar. 29, 1915.)

NAVIGABLE WATERS: Damages to wharf resulting from dredging operations.

The owner of a wharf on the river front in the City of Troy, N. Y., alleged that as a result of dredging operations carried on by authority of Congress in the river in front of his wharf the said wharf was damaged. He claimed that the Government was responsible and should restore the wharf to its former condition. He did not assert that the damage was the result of carelessness or negligence on the part of those executing the dredging operations, but contended that—

“Where the work contemplates damage to the property of individuals or where the damage is necessarily incident to the work, though unintentional, that damage should be repaired or compensated for as a part of the original plan and paid for out of the funds appropriated for the execution of that plan.”

On behalf of the Government it was shown that the dredging operations were carried on in conformity with the project adopted by Congress for the improvement of the river; that the excavations were confined to the natural channel; that the contractor used all reasonable precautions; and that the failure of the wharf was not due to carelessness on the part of the contractor but to the weakness of the construction and the failure of the owner to take proper steps to strengthen it after having been fully and seasonably advised of the possibility of damage.

Held, that as to structures situated waterward of high water mark on navigable waters as this one was, the cases are clear that they are subject to the consequences resulting from the exercise by Congress of the dominant right to improve the navigable waters, and that the Government is not liable for any damages resulting from the prosecution of such an improvement where such damages are purely consequential as in the instant case.

(62-853, J. A. G., Mar. 27, 1915.)

REWARDS: Not payable except in pursuance of a previous offer.

Four fishermen who found a drifting submarine mine in the ocean surf recovered it, and it was later taken possession of by the military authorities. On the question as to whether the fishermen could be paid a small reward,

Held, that as no reward had been offered, a payment as suggested would be in the nature of a payment for voluntary services and unauthorized in the absence of an express statute covering such cases.

Held further, that a reward for services of this character might be paid from the appropriation for contingencies of the Army in any case where the services were performed in pursuance of an offer of reward previously made.

(80-015, J. A. G., Mar. 18, 1915.)

TAXATION: Internal revenue stamp on soldier's baggage at customhouse.

The Internal Revenue Act of October 22, 1914 (38 Stat., 762), requires the payment of a stamp tax upon the “entry of any goods,

wares, or merchandise at any customhouse, either for consumption or warehousing, not exceeding \$100 in value, 25 cents," which applies ordinarily to personal baggage of persons arriving at any port of the United States by sea. The Department's attention was called to the fact that noncommissioned officers returning from detached duty, conducting detachments of recruits to the Canal Zone, were required by the customhouse officials at New York to pay 25 cents as a stamp tax on each baggage declaration for their personal baggage, consisting only of necessary clothing and toilet articles.

Held, that the provision of law in question was not intended to be so applied as to tax officers of the Federal Government or soldiers in the performance of their official duties.

(90-313, J. A. G., Mar. 26, 1915.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

APPROPRIATIONS: Expenses for heating apparatus in new buildings.

Upon the question whether the cost of heating apparatus for a new building at the Army and Navy General Hospital, Hot Springs, Ark., should be considered as a part of the expenses of construction of such building, within the meaning of the appropriation "Construction and repair of hospitals," and included in the limit of \$20,000 fixed by Section 1136, Revised Statutes,

Held, that if Congress had made no other provision for such equipment the construction appropriation would be available therefor, but that inasmuch as the appropriation "Regular supplies" contained a specific provision for "heating apparatus," the cost of such equipment could not properly be considered as an item of construction, within the limit fixed by Section 1136, Revised Statutes, but the expense should be incurred under and chargeable to the appropriation "Regular supplies."

(Comp. Geo. E. Downey, Mar. 24, 1915.)

CONTRACTS: Deduction for liquidated damages when in fact none resulted from delayed performance.

A contractor for furnishing and erecting lock gates for a lock and dam construction within six months after notification of the approval of the contract was delayed for the convenience of the Government, and for other causes excusable under the contract, in making delivery of the gates until after the contract period had expired, and the time was extended in accordance with the terms of the contract for a period equal to the delay for which the contractor was not responsible. The contractor failed to complete the work within the contract time, as extended, and required 32 days additional. It was stipulated that time was of the essence of the contract, and liquidated damages at the rate of \$20 per day were agreed upon for such delays as were not excusable, in addition to the cost of superintendence and inspection. In submitting voucher for final payment the

contracting officer certified that the completion of the general improvements was not delayed by the delay in the completion of this contract, nor had the United States suffered any actual damages other than the cost of superintendence and inspection.

Held, that the contract having provided for the deduction of liquidated damages at an agreed rate, and such provision not having been waived or nullified by the acts of the parties, neither of the contracting parties could be heard to say that the delay not properly excused had in fact resulted in no damages to the Government; that where agreed liquidated damages are not manifestly unreasonable or capricious, such agreement will be enforced regardless of whether any damages in fact result; that the provision in the contract for the proper extension of time to equal that lost without fault of the contractor operated to overcome the rule announced in judicial decisions that where the Government is responsible for the failure of a contractor to complete a work within a stipulated time it forfeits all claim to the stipulated damages for subsequent delays for which the contractor is responsible.

Held further, that the contracting officer having in mind the weather conditions usually prevailing during the original contract period in this case, and those that actually prevailed after its expiration, might be justified in making a more liberal finding as to the extension of time properly allowable to the contractor on the theory that one day after the original contract time expired was not equivalent to one day prior thereto.

(Comp. Geo. E. Downey, Jan. 29, 1915.)

HEAT AND LIGHT: Fictitious leases of quarters.

The Auditor for the War Department disallowed certain payments for heat and light under a lease of quarters made by a quartermaster, purporting to be for one room to be occupied by a quartermaster sergeant, the rental price being specified as \$14 per month, and heat and light additional in accordance with the allowances specified in Army Regulations. The Auditor's action in disallowing the items for heat and light was based on the fact that the disbursing officer made a statement to the effect that \$14 was the commercial value of the room occupied, and that, therefore, the additional charge for heat and light was not a proper charge against the United States. On appeal to the Comptroller,

Held, that the so-called lease was fictitious and a subterfuge, as the "room" rented was in fact a six-room house for which the agreed rental was \$20 per month, the entire house having been occupied by the sergeant and his family, and the lessor having furnished no heat or light for the house; that, owing to the irregularities, the Auditor would have been justified in disallowing credit for any part of the payments, including the \$14 per month rental, but inasmuch as it appeared that a suitable room could not have been secured for less than \$14 per month, that item was allowed.

(Comp. Geo. E. Downey, Mar. 31, 1915.)

PURCHASE OF SUPPLIES: Requirement as to advertising in purchasing motor trucks.

The Chief Signal Officer, desiring to obtain two motor trucks of a certain make, requested the Quartermaster Department to purchase them "conforming with the specifications of your department." Circular advertisements were sent out to different manufacturers for two motor trucks in accordance with specifications approved by the Chief Signal Officer. The lowest bid obtained was \$2,200 each, and the next lowest was \$2,500 each for the *make* of truck desired by the Chief Signal Officer, who recommended that the latter be purchased, as they were "considered far more desirable for use in the aero squadron than any other type of truck." On the Chief Signal Officer's further recommendation, approved by the Assistant Secretary of War, all proposals were rejected, and the two trucks of the *make* desired by the Chief Signal Officer were obtained by what was considered an open-market purchase.

Held, that the insistence of the Chief Signal Officer for a truck of a particular *make* when trucks of other makes would meet his own specifications as to type did not warrant the purchase, without advertising, of trucks of that *make*, and that the fact that a number of dealers submitted bids was sufficient evidence that the desired *type* of truck could be obtained from other than one dealer, but that, notwithstanding the recommendation of the Chief Signal Officer to reject all bids and obtain trucks of a particular *make* by an open-market purchase, the purchase was actually made as the result of due advertisement, and that it was doubtless within the discretion of the Secretary of War to purchase other than of the lowest bidder if such purchase was fairly deemed to be in the best interests of the Government.

(Comp. Geo. E. Downey, Mar. 8, 1915.)

TRANSPORTATION: Land grant deductions.

The Union Pacific Railway Company appealed from the action of the Auditor in the matter of disallowances on account of land grant deductions in settlement for passenger transportation on Government requests for—

- (1) Rejected applicants for enlistment in the Army en route to the recruiting station.
- (2) Discharged enlisted men en route to their homes or elsewhere after serving sentence as military prisoners.
- (3) Enlisted men of the Army en route to their homes on discharge.
- (4) Enlisted men of the Army en route to their homes on retirement.
- (5) Enlisted men of the Army en route to their proper stations after having reported from furlough.

The railway company contended that these classes of persons were not troops, within the meaning of the land grant acts, and therefore the deductions made by the auditor were unauthorized.

Held, in affirming the action of the auditor, that the transportation of troops as contemplated by the land grant acts applies to the transportation required by the United States for all persons in con-

nection with its military service, and extends from the beginning of the process of securing men for the military service until they are returned after severance of said connection to the place where the initial steps for entering the service were taken.

(Comp. Geo. E. Downey, Mar. 24, 1915.)

DECISIONS OF THE COURTS.

(Digests prepared in the office of the Judge Advocate General.)

CONTRACTS: Damages for breach and deduction from moneys due under subsequent contract.

A contractor for furnishing certain material for the use of the Panama Canal Commission in the construction of water systems in the Canal Zone failed to deliver the materials on contract time, the last delivery being about three months overdue. On account of such delay, the water systems were installed three months later than they otherwise would have been, and in consequence suitable drinking water had to be transported to the cities involved in tank cars at considerable expense. Other expenses were also incurred on account of the delayed deliveries. The contractor, however, was paid the full amount of his contract without deductions, there being no liquidated damage clause in the agreement. A subsequent contract was entered into between the same parties to furnish like material, and was duly performed, but in settlement the Canal Commission deducted the sum of \$1,000 as damages claimed to have been sustained by the United States on account of delay in the performance of the first contract. In an action by the contractor to recover, the Government set up a counter claim of \$8,182.34 as additional damages alleged to have been sustained under the first contract due to the delayed performance thereof.

Held, that the payment of the whole amount due under the first contract was a final settlement of all matters connected with that contract, and that the settlement could not thereafter be questioned except for fraud or mistake of fact, and there being no evidence of either, the counter claim could not be sustained, and the claimant was entitled to recover the \$1,000 sued for.

(*Camden Iron Works v. United States*, No. 30307, Ct. Cl., Mar. 15, 1915.)

CONTRACTS: Default of contractor; liability of surety; new contract.

Under a contract dated February 23, 1905, for the construction of a building for the United States, the contractor engaged to furnish all material and labor, and to complete the building on or before September 1, 1905, furnishing a penal bond in the sum of \$6,500 for the faithful performance of the contract. The United States was given the right under the contract, in the case of the contractor's default, to complete the work at the contractor's expense, "in which event" the contractor and his surety were to be further liable for any damages incurred through such default and any and all other breaches of his contract. The contract required the contractor to be

responsible for all damages to the building, whether from fire or other causes, during the prosecution of the work and until its acceptance, and declared that partial payments were not to be considered as an acceptance of any part of the work or material. Under the terms of the agreement, the contractor was paid as the work progressed an aggregate of \$7,895.40. The contractor not only failed to complete the work on or before the first of September, but failed, after that date, to take such action as would remedy his default. On October 27 the United States rejected the work and materials and the building as offered for acceptance, and on November 4, while the contractor was still in possession, it was completely destroyed by fire. He took no steps thereafter to rebuild, or to carry out the terms of the contract; whereupon the United States declared him in default and confiscated certain materials, etc. About a year thereafter, the United States entered into a contract with another party for the erection of the desired building on the same site, but the building was to be materially different and more expensive. In an action against the defaulting contractor and the surety for damages, including the recovery of the amount of the progress payments with interest,

Held, that the surety company's liabilities for all damages became fixed upon occurrence of the complete default of the contractor, and was not released by the failure of the Government to have the same work completed in accordance with the first contract; that the rights and liabilities between the parties, being fixed by the complete breach of the agreement, were not to be affected by any subsequent and independent transaction between the Government and third parties, the doctrine exonerating the surety on the bond by the public contractor in case of a change in the contract having no application. *Held further*, that the Government was entitled to interest on the amount of the advance payments from the time the work should have been completed under the contract, but that the surety company was liable as to the interest only for such an amount as accrued from its own default in unjustly withholding payment after being notified of the default of the principal.

(*United States v. U. S. Fidelity & Guaranty Co.*, decided by the U. S. Supreme Court Feb. 23, 1915.)

PARDON: Not effective until accepted.

A witness in a grand jury investigation of alleged customs frauds, in violation of the Federal Criminal Code, refused to answer certain questions, claiming upon his oath that his answers might tend to criminate him. Thereupon he was remanded to appear at a later date, and upon so appearing he was handed a pardon from the President, which he was told had been obtained for him upon the strength of his testimony before the other grand jury. He declined to accept the pardon or to answer the questions which he claimed would tend to criminate him. He was then presented by the grand jury to the district court for contempt, adjudged guilty thereof and compelled to pay a fine of \$500. Upon appeal by writ of error to the Supreme Court,

Held, that a pardon from the President, to be effective, must be accepted by the person to whom it is tendered; that the tender of a pardon from the President does not destroy the privilege of a witness against self-crimination, but he may reject the pardon and refuse to testify on the ground that his testimony may have an incriminating effect.

(*Burdick v. United States*, decided by the U. S. Supreme Court Jan. 25, 1915.)

BULLETIN 18.

BULLETIN
No. 18. }

WAR DEPARTMENT,
WASHINGTON, May 15, 1915.

The following digest of opinions of the Judge Advocate General for the month of April, 1915, and of certain decisions of the Comptroller of the Treasury and of the courts, is published for the information of the service in general.

[2255370 C—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR.

TASKER H. BLISS,
Brigadier General, Acting Chief of Staff.

OFFICIAL:

H. P. McCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ARMY RESERVE: Medical treatment of members.

On the question whether members of the Army Reserve are entitled to medical treatment in military hospitals,

Held, that there is no authority therefor; that the status and rights of reservists are determined by the Act of August 24, 1912, establishing the Army Reserve, which Act declares that soldiers are to be furloughed to the Army Reserve under conditions therein specified, "without pay and allowances," and that the language "without pay and allowances" comprehends not only fixed allowances, but those of an indirect nature like medical supplies and attendance and hospital treatment.

(6-300, J. A. G., Apr. 10, 1915.)

DESERTER: Transportation and burial of remains of deserter killed while resisting arrest.

A soldier on duty at Tientsin, China, as Legation Guard, deserted in 1912, and about two years thereafter was arrested by the marshal of the United States consular court at Shanghai, China, on the charge of desertion. While attempting to escape from such custody, he was shot and killed by the prison keeper, and was buried at Shanghai. Request was made by the soldier's mother to have the remains removed to this country for burial at the expense of the United States. The usual provision contained in the current Sundry Civil appropriation act (38 Stat., 631) authorized the removal to their homes or to a national cemetery at public expense "of the remains of officers * * * and enlisted men on the Army active list." On the

question whether the soldier could be considered as having been on the active list at the time of his death within the meaning of this legislation, in view of the fact that at such time he was borne on the rolls as a deserter, but had not been convicted by a court martial,

Held, that for certain purposes the fact of desertion may be determined administratively (Dig. Op. J. A. G., 1912, p. 416; 12 Comp. Dec., 328); that when the charge of desertion is entered, following the unauthorized absence of the soldier, he is dropped from the rolls of the Army as a deserter, and that this effectively removes him from the "active list," to which he is not again restored until he is returned to military control and at least taken up as a returned deserter; that in the instant case, as the party had not been returned to the military authorities and taken up as a returned deserter, he could not properly be regarded as being on the active list at the time of his death, within the meaning of the statute in question.

(5-244.1, J. A. G., Apr. 2, 1915.)

FOREIGN SERVICE: Limitation as to service in the Philippines and Canal Zone.

As to the proper construction of the following proviso in the Army appropriation act approved March 4, 1915:

"That on and after October first, nineteen hundred and fifteen, no officer or enlisted man of the Army shall, except upon his own request, be required to serve in a single tour of duty for more than two years in the Philippine Islands, nor more than three years in the Panama Canal Zone, except in case of insurrection or of actual or threatened hostilities."

Held, that this legislation applies to tours of duty entered upon before October 1, 1915, as well as those begun on or after that date, and that consequently any officer or enlisted man serving in the Philippine Islands or in the Canal Zone on or after October 15 [1], 1914, unless he has requested otherwise, will come within the limitations of the act, upon his completion of two years' service in the Philippines, or three years' service in the Canal Zone, of his current tour of duty.

(92-400, J. A. G., Apr. 8, 1915.)

INSURANCE: Packages sent by parcel post.

An officer of the Medical Department requested that he be furnished a supply of postage stamps for parcel post insurance purposes, stating that the stamps were required for insuring packages sent by mail containing articles of considerable value.

Held, that in the absence of a specific appropriation therefor, the stamps could not legally be furnished, the Comptroller having repeatedly ruled against the propriety of government officers incurring expenses for the insurance of government property, both upon the ground that the appropriations sought to be charged with the expenses were not available, and because it was against the policy of the government to insure its property.

(5-244, J. A. G., Apr. 5, 1915.)

NEGLIGENCE: Pay of enlisted men entrusted to officer, loss of.

In the payment of a troop of cavalry the commanding officer thereof, under authority of Par. 723, Manual for the Pay Department, 1910, received the pay of twenty enlisted men who were on detached service. A few days thereafter this officer, preparatory to taking advantage of a leave of absence, turned the money over to a lieutenant, the next senior officer on duty with the troop. The latter officer locked the funds in a desk in his quarters, and they were stolen from the desk by an enlisted man, who deserted. A board of officers convened to investigate the matter found, as a fact, that the loss of the funds was due to negligence on the part of the lieutenant in placing them in his desk instead of depositing them in the quartermaster's safe.

Held, that in the absence of an express provision to the contrary an officer whose duty it is to receive pay of absent enlisted men, under Par. 269, Manual for the Pay Department, may require the assistance of subalterns in the performance of this duty; that it was proper for the commanding officer of the troop, preparatory to going on leave of absence, to dispose of the funds as he did; and that as the loss of the funds was due to negligence on the part of the officer to whom they were thus properly transferred, the latter should be held responsible therefor.

(72-514, J. A. G., Apr. 30, 1915.)

PAY AND ALLOWANCE: Deduction of pay for absence due to misconduct during prior enlistment.

The question was presented whether a soldier who was absent from duty on account of a venereal disease contracted during a previous enlistment, and which was not detected at the time of his reenlistment, was entitled to pay for the period of such absence, in view of the provision of the Act of April 27, 1914 (38 Stat., 353), against the allowance of pay to any officer or enlisted man for time absent from duty "on account of disease resulting from his own intemperate use of drugs or alcoholic liquors or other misconduct." The soldier was discharged from his first enlistment in July, 1911, and reenlisted in April, 1914. It was suggested by the surgeon that the soldier was guilty of fraud in connection with his latter enlistment.

Held, that if the soldier knowingly and wilfully misrepresented his physical condition at the time of his 1914 enlistment, and his acceptance depended upon his concealment and misrepresentation of the true facts, he was guilty of fraudulent enlistment and subject to trial by court-martial, as provided by Section 3 of the Act of July 27, 1892 (27 Stat., 278); that the punishment in such cases, if any, should be for fraudulent enlistment; that the Act of April 27, 1914, was intended to secure good conduct on the part of soldiers in the service, and not for the purpose of penalizing prior misconduct, and was not applicable in the instant case.

(72-210, J. A. G., Mar. 23, 1915.)

PENALTY ENVELOPES: Furnishing to contractors for shipment of contract supplies.

An officer of the Quartermaster Corps inquired whether, in the purchase of small articles from a contractor whose obligation was completed as soon as the property was ready for shipment, it would be permissible to furnish the contractor with penalty envelopes to be used in forwarding the supplies by parcel post. It was pointed out that if such shipments could be made by parcel post under penalty envelopes, it would result in a considerable saving to the Government, it having been the custom in such cases to send the contractor a bill of lading covering the shipment at Government expense.

Held, that section 3 of the Act of March 3, 1879 (20 Stat., 352), providing in part "That any Department or officer authorized to use the penalty envelopes may inclose them with return address to any person or persons from or through whom official information is desired, the same to be used only to cover such information and indorsement relating thereto," is the only instance of specific authority for the use of penalty envelopes by private persons, and that according to a familiar rule of construction, it is to be taken as excluding their similar use in any other connection. See par. 837, A. R. 1913.

(22-020, J. A. G., Apr. 10, 1915.)

POST EXCHANGES: Dividends.

General Order No. 109, W. D., 1911, prescribes the method of distribution of net profits of post exchanges. When a dividend is declared, the fund is required to be distributed as therein directed, and as to Engineers, it is specified: "Where members belong to the Corps of Engineers, it will be paid to the Engineer Band." On the question whether a camp exchange at Texas City, Tex., consisting of a company or certain companies of Engineers was within the scope of this regulation and required to pay a share of net profits to the Engineer Band at Washington Barracks,

Held, that the camp exchange was not a regulation post exchange but was of an informal character created to meet special conditions where the advantages of a regular post exchange were not accessible; that as exchanges of this character are not required to comply with the general regulations in respect to their organization and operation, it would not be consistent to hold that they are within the operation of the provision concerning the payment of dividends.

(40-1045, J. A. G., Apr. 19, 1915.)

TRANSFER: Of property no longer needed for purpose for which it was purchased.

It was proposed to transfer to the Signal Corps in Alaska a team of dogs belonging to the Bureau of Fisheries, Department of Commerce, at Copper Center, Alaska, for which the Bureau of Fisheries had no immediate use. On the question whether the dogs could be subsisted from the appropriation for "Regular Supplies, Quartermaster Corps." which in terms provides for the subsistence of animals "of the Quartermaster Corps."

Held, that it being well settled that when public property has ceased to be of use for the specific purpose for which it was purchased, it may lawfully be loaned or transferred to some other bureau or department of the Government where it can be utilized in the public service, such transfer not being regarded as in conflict with Sec. 3678, Revised Statutes (Dig. Op. J. A. G., 1912, pp. 31-32), the appropriation for "Regular Supplies, Quartermaster Corps" should be regarded as available for the subsistence of the dogs so transferred, it being understood that the dog team could be used advantageously by the Signal Corps in addition to the teams of this character already supplied by the Quartermaster Corps.
(80-138; 5-243, J. A. G., Apr. 27, 1915.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

COURT-MARTIAL SENTENCES: Scope of sentence forfeiting pay; extra duty pay.

A forfeiture of 20 days' pay was imposed upon a private of the Army Service Detachment, U. S. Military Academy, by a summary court martial. Upon the question whether the sentence included extra duty pay of 35 cents a day as laborer,

Held, that extra duty pay depends entirely upon whether or not the soldier is assigned to such duty as gives him the extra duty pay status; that it is contingent upon an assignment by order, and uncertain as to time; that the sentence of the court martial should be absolute, definite, and certain, and not dependent upon any contingency, and that it should be presumed that the pay which the court-martial had in mind was the soldier's monthly pay, as fixed by law; that while the allowance per day for the performance of extra duty is designated as "pay," it is nevertheless in the nature of an allowance (*Sherburne v. United States*, 16 Ct. Cls., 491), and its payment is dependent upon the contingency of assignment to duty in orders, etc., and should not, therefore, be regarded within the sentence to forfeit 20 days' pay in the case presented.

(Comp. Geo. E. Downey, Jan. 20, 1915.)

Under authority of the Act of September 27, 1890 (26 Stat., 491), which provides "That whenever by any of the Articles of War for the government of the Army the punishment on conviction of any military offense is left to the discretion of the court martial the punishment therefor shall not, in time of peace, be in excess of a limit which the President may prescribe," the President, by the existing Executive Order No. 2043, of September 5, 1914, Article II, has enumerated the several military offenses for which a maximum limit of punishment is prescribed, with the character of the punishment stated. For many of the offenses, the punishment prescribed involves forfeiture of so many days' pay, or, for example, under the 20th Article of War, for the offense of disrespect to a commanding officer, the punishment may not exceed "confinement at hard labor for six months, and forfeiture of two-thirds of his pay per month for a like period."

On the questions as to what is to be considered as "pay" in such cases,

Held, that where a court-martial sentence directs the forfeiture of pay it means the rate of compensation as specifically fixed by law as pay proper, and does not refer to contingent allowances, extra duty pay, and the like; that the term "pay per month" used in Executive Order No. 2043 means the monthly rate of pay fixed by law for the grade in the service of the convicted person, and that a forfeiture of one day's pay, for example, requires that one-thirtieth of the monthly rate should be withheld. *Held further*, that where the sentence of forfeiture is to apply to future pay, and the rank of the soldier is changed during the continuance of such forfeiture period, resulting in a change in his rate of pay, there should be a corresponding change in the amount of the forfeiture.

(Comp. Geo. E. Downey, Apr. 28, 1915.)

HEAT AND LIGHT: Commutation thereof commencing July 1, 1915.

A provision contained in the Army appropriation act for the fiscal year 1916 provides:

"For commutation of quarters, and of heat and light, to commissioned officers, acting dental surgeons, veterinarians, pay clerks, members of the Nurse Corps, and enlisted men, \$640,000."

Held, that this provision is to be read in connection with the existing legislation of March 2, 1907 (34 Stat., 1167), providing that the heat and light *actually necessary* for the authorized allowance of quarters for officers and enlisted men shall be furnished at public expense, and that commutation of these allowances should therefore be in accordance with the commuted value thereof as determined and set forth, as to heat, in par. 1036, A. R., 1913, as amended by C. A. R. 21, Feb. 19, 1915; and as to light, as set forth in the following table (subject to the changes indicated in Sec. 3, par. 1057, A. R., 1913, as amended by C. A. R. 19, Feb. 10, 1915, for stations in Alaska, the tropics, and the south temperate zone):

Rooms.	April to September, inclusive, value per month.	October to March, inclusive, value per month.	Rooms.	April to September, inclusive, value per month.	October to March, inclusive, value per month.
10.....	\$3.24	\$5.16	5.....	\$1.62	\$2.58
9.....	2.88	4.62	4.....	1.44	2.28
8.....	2.70	4.32	3.....	1.26	2.04
7.....	2.40	3.84	2.....	.90	1.44
6.....	1.98	3.18	1.....	.72	1.08

(Comp. Geo. E. Downey, Apr. 28, 1915.)

NOTE.—The rates indicated are for the commutation of heat and light for the fiscal year 1916 for the number of rooms actually occupied, but not exceeding the authorized allowance. Voucher forms therefor are under consideration by the Comptroller and will be acted upon in due course.

TRANSPORTATION: Procuring ticket in variance with transportation request.

A government transportation request called for an ordinary passenger ticket at the lowest limited rate from Los Angeles, Cal., to Portola, Cal., which rate was \$26.45. This request was used by a government employee who requested the railroad agent to furnish a ticket reading via San Francisco, which was done, and the railroad company charged \$30.65 therefor, the regular rate for the longer route.

Held, that the Government was liable only for the payment for the service which the transportation request called for, and that the employee who requested the agent to issue the ticket by a longer route should be required to pay the difference to the railroad company. *Held further*, that if, in any case, transportation in excess of that indicated on the transportation request is required in the interests of the Government, the traveler should pay the excess cost and present a claim for reimbursement.

(Comp. Geo. E. Downey, Apr. 6, 1915.)

TRANSPORTATION: Loss of ticket procured on transportation request; liability.

The Quartermaster at Boston, Mass., issued a request for transportation by a certain railroad for two persons, accepted applicants for enlistment, from Boston, Mass., to New Rochelle, N. Y., a recruiting depot. The request was duly presented and two first-class limited tickets were issued thereon. One of the men used his ticket, but the other reported that he lost his. The Auditor disallowed the railroad company's claim for the value of the lost ticket. The company contended that although its records did not indicate that the ticket had been used, the ticket was valid for the use of the holder at any time and may have been used for but a portion of the distance, in which event such service would be represented only by the conductor's cancellations, and would not appear of record.

Held, that transportation requests are used by the United States the same as cash in procuring transportation; that the railroad company having issued the ticket called for by the request, the legal presumption was that the company furnished the service and such presumption could be rebutted and claim made for refund only by the production of the unused ticket. *Held further*, that the person to whom the ticket was furnished should have been charged with the cost thereof at the time and that the amount should be recovered from him if possible.

(Comp. Geo. E. Downey, Apr. 30, 1915.)

DECISIONS OF THE COURTS.

(Digests prepared in the Office of the Judge Advocate General.)

HABEAS CORPUS: Fraudulent enlistment of minor.

A woman whose son fraudulently enlisted in the Army by falsely stating that he was over 21 years of age instituted habeas corpus

proceedings for the soldier's discharge on the ground that the enlistment was void under Sec. 1117, Revised Statutes, which provides:

"No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: *Provided*, that such minor has such parents or guardians entitled to his custody and control."

After the service of the writ of habeas corpus, but before the hearing thereon the soldier was arrested by the military authorities for fraudulent enlistment in violation of the 62d Article of War. Section 761, Revised Statutes, provides relative to habeas corpus proceedings that—

"The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as *law and justice require*."

Held, that while the parent or guardian who had not consented to the minor's enlistment could reclaim the custody of the minor, yet, in view of Sec. 761, Revised Statutes, it was deemed that law and justice did not require that he be taken from the military authorities until he had made amends to the United States for his offense of fraudulent enlistment.

(*United States ex rel. Laikund v. Williford* (C. C. A.), 220 Fed., 291.)

ARMY OFFICERS: Promotion; injunction suit.

The act of April 1, 1890 (26 Stat., 502), requires that promotions to every grade in the Army below the rank of brigadier general "shall, subject to the examination hereinafter provided for, be made according to seniority in the next lower grade." Plaintiff, a senior officer in the grade of Major, brought suit to enjoin the Secretary of War "from taking any action or steps of whatsoever kind in violation of plaintiff's right to be nominated by the President of the United States to the Senate thereof" to fill a vacancy in the grade and rank of Lieutenant Colonel.

Held, that no duty is imposed upon the Secretary of War in respect of the section of the act in question, which relates only to the action of the President; that the attempt to invoke judicial interference was in fact an attempt to reach the Executive through his representative, which may not be done; and that there was, therefore, no basis for judicial action.

(*Ray v. Garrison*, 42 D. C. App., 34.)

BULLETIN 21.

BULLETIN }
No. 21. }

WAR DEPARTMENT,
WASHINGTON, June 16, 1915.

The following digest of opinions of the Judge Advocate General of the Army for the month of May, 1915, and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2255370 D—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Major General, Chief of Staff.

OFFICIAL:

H. P. McCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

A CORRECTION.

On page 4 of Bulletin 18, War Department, 1915, in the digest of an opinion on the subject "Foreign Service: Limitation as to service in the Philippines and Canal Zone," the date October 15, 1914, should be October 1, 1915.

CONTRACTS: Default of contractor; liability of surety.

In due course after award was made to the lowest bidder for furnishing supplies for the Army, contract was forwarded to the bidder for execution, who about the same time went into bankruptcy and turned the contract papers over to the surety company, surety for the faithful execution and performance of the contract. The surety company was given notice and afforded an opportunity to make satisfactory arrangements as to carrying out the principal's obligation. No action having been taken by the surety company, new bids were invited resulting in an award to the lowest bidder at an advance aggregating \$957.87 over the first award and \$550 over the next lowest bid under the first advertisement. The surety company offered \$550 in settlement of its liability, claiming that the Government should have awarded the contract to the next lowest bidder under the first advertisement, and that the amount offered was accordingly the amount for which the surety was only liable.

Held, that the acceptance of the one bid in the first instance was a rejection of all other bids; that the other bidders were thereby relieved from any obligation to enter into a contract; and that the

surety company was therefore liable to the Government for the entire excess cost of the supplies under the new award, amounting to \$975.87, due to its principal's default.

(76-222, J. A. G., May 13, 1915.)

CONTRACTS: Procedure on default; surety.

A contractor for furnishing oats for the Army having defaulted in making a delivery, a supply was purchased in the open market in accordance with the terms of the contract at a cost aggregating over \$500 in excess of the contract price. The contracting officer advised the Department that there was due the contractor \$87.03 for oats delivered on a previous order, and he requested instructions as to whether this sum should be paid to the contractor and the whole amount of excess cost of procuring oats elsewhere, due to this and any other default, collected from the surety, and in this event whether he should take steps to make the collection.

Held, that the \$87.03 referred to should be checked into the Treasury by the contracting officer as part collection of the amount due the Government by the contractor, this being justified under the common right of set-off, and that he should promptly notify both the contractor and the surety of the default and the amount of their liability resulting therefrom, less the set-off referred to, and that upon their failure to make prompt settlement the matter should be referred to the Solicitor of the Treasury, through the War Department, who has charge of the enforcement of bond obligations.

(76-742, J. A. G., May 27, 1915.)

COURT-MARTIAL SENTENCE: Detention of pay in lieu of forfeiture.

The question was presented whether, in view of Section 2 of Article III of the Maximum Punishment Order, which provides "In lieu of forfeiture of pay the court may, at its discretion, adjudge detention of pay at the rate of one and one-half days' pay for each day of pay the forfeiture of which is authorized; but no sentence shall adjudge the detention of more than *two-thirds of the soldier's pay per month for three months*," the detention of one-half pay per month for four months would be permissible, this being as to amount equivalent to "two-thirds of the soldier's pay per month for three months."

Held, that the detention being in lieu of forfeiture, and in two-thirds of the amount authorized by statute, the limitation of the Maximum Punishment Order should be regarded as applying to the amount rather than the period; and that, therefore, detention of one-half pay for four months would not be illegal.

(30-483, J. A. G., May 17, 1915.)

DESERTION: Effect of, on position of noncommissioned officer.

A soldier of the Quartermaster Corps who had been dropped as a deserter while a corporal, surrendered on March 15, 1915, and was taken up by the Quartermaster Corps as a corporal. The question

as to whether he should have been taken up as a corporal was submitted, which involved a consideration of the effect of the omission from Par. 277, A. R., by C. A. R. 15, November 19, 1914, of the sentence, "The desertion of a noncommissioned officer vacates his position from the date of his unauthorized absence."

Held, that it was intended by the omission of this sentence in the revision of Par. 277, A. R., to abolish the provision that noncommissioned officer should vacate his position from the date of his unauthorized absence and to require that his reduction should be accomplished by administrative action, and that this interpretation should be placed upon the paragraph as amended.

(52-241, J. A. G., May 19, 1915.)

DETACHED SERVICE: Newly appointed commissioned officers.

Upon the question as to the legality, under the detached service law (37 Stat., 571), of assigning newly appointed commissioned officers of field artillery for a preliminary course of training and instruction at the School of Fire for Field Artillery, Fort Sill, Okla., and attaching them to the instruction or other batteries on duty there.

Held, that there seemed to be no reason why such a newly appointed officer may not be assigned or attached as indicated, provided that the regular complement of officers of such organization is not thereby exceeded, and that the officer occupy the normal duty status with the battery; nor any legal objection to his receiving instruction at the School of Fire when so assigned or attached, so long as such instruction does not impair his duty status; but that an attachment for the purpose of taking the course of instruction which is inconsistent with the normal duty status, or an assignment or attachment of officers to a battery in excess of the complement authorized by law would be a violation of the statute.

(6-124, J. A. G., May 5, 1915.)

DETACHED SERVICE: Officer on garrison duty in command of detachment.

A battalion of the 14th Infantry having been ordered to garrison the posts in Alaska, and Companies A and C of that regiment having been directed to take station at Fort Seward, it was further ordered that one officer and 50 enlisted men of those companies form a garrison at Fort Liscum. Accordingly, a lieutenant of Company C was sent to Fort Liscum with 25 men of his own company and 25 men of Company A. He was the only line officer at Fort Liscum.

Held, that the officer occupied a normal duty status with the detachment, and that as the 25 men of his own company whom he commanded were not separated from their company for the performance of a duty different from the normal company duty—the command of the detachment from Company A being additional duty not disturbing his relation to the detachment from his own company (Bull. 22, W. D. 1914, p. 25)—the officer should be regarded as on duty with his company as required by the detached service law (37 Stat., 571).

(6-124, J. A. G., May 19, 1915.)

EIGHT-HOUR LAW: Construction of dredge for Government under contract.

The question was submitted for opinion as to whether a dredge being constructed by a contractor under a contract with the Government comes within the term "public works" as used in the 8-hour law restricting the employment of laborers and mechanics upon "public works" to 8 hours a day (27 Stat., 340). Until the promulgation of G. O. 29, Office of Chief of Engineers, October 30, 1912, the matter of construction under contract of vessels of the United States was not regarded as coming within the term "public works" as used in the 8-hour law, this construction being in accordance with an opinion of the Attorney General (26 Op. Atty. Gen., 30). In that order, the construction was changed, in view of a Supreme Court decision (219 U. S., 24), holding that a vessel being constructed for the United States was a "*public work*" within the meaning of the statute providing for the protection of persons supplying labor or materials for the construction of or repairs upon "any public building or *public work*."

Held, that the statute for the protection of labor and material men used a broader term than that used in the 8-hour statute; that the change in the construction of the statute promulgated in the above-mentioned order was not warranted by the Supreme Court decision cited therein, and that therefore, following the opinion of the Attorney General, the 8-hour law should be regarded as having no application to the construction of the dredge in question.

(32-213, J. A. G., May 14, 1915.)

FOREIGN SERVICE: Pay clerks.

Upon the question whether pay clerks come within the following provision of the Army Appropriation Act approved March 4, 1915.

"That on and after October first, nineteen hundred and fifteen, no officer or enlisted man of the Army shall, except upon his own request, be required to serve in a single tour of duty for more than two years in the Philippine Islands, nor more than three years in the Panama Canal Zone, except in case of insurrection or of actual or threatened hostilities."

Held, that pay clerks are included in the term "officer of the Army," as used in this statute.

(92-400, J. A. G., May 4, 1915.)

HEAT AND LIGHT: Noncommissioned officers occupying quarters outside of post.

Certain noncommissioned officers above grade 16 (Par. 9, A. R.), who were entitled to separate quarters, rented and occupied quarters "outside of camp" by permission of their commanding officer. Upon the question whether they were entitled to reimbursement for the usual allowances of heat and light under such conditions,

Held, that if there were quarters available for these men at the post and they elected to rent other quarters for themselves outside the post with permission of their commanding officer, they should be regarded as having waived their right to heat and light allowances.

(72-414, J. A. G., May 1, 1915.)

HEAT AND LIGHT: Pay clerks.

In the Army Appropriation Act for the fiscal year commencing July 1, 1915, pay clerks are included in the list of those for whom commutation of quarters and of heat and light is provided under "Miscellaneous." They are not expressly included, however, in the list of officers and others for whom heat and light in kind are provided under "Regular Supplies," the statutory provision for these allowances in kind for the next fiscal year being in terms the same as for several years past, in which pay clerks have been held not to be included (Bul. 5, W. D., 1915, p. 5).

Held, therefore, that in respect of such allowances, the law makes provision only for commutation of heat and light to pay clerks which is available only when such clerks shall be on a commutation status as to quarters, and that no provision is made for furnishing them with heat and light in kind.

(6-134, J. A. G., May 11, 1915.)

PRISONERS: Introducing money into prison room.

In a report on the inspection of the Coast Defenses of Chesapeake Bay, in August, 1914, by an officer of the Inspector General's Department, it was said:

"General prisoners attempting to introduce money into prison room are required to contribute same to the mess fund, and such amounts are taken up and appear on vouchers to the fund. (Par. 327, M. G. D.)."

In explanation of this procedure, the commanding officer said:

"When prisoners are first confined they are searched and personal effects including money taken away from them and returned to them upon their release. If a prisoner finds money and upon his return to the guard house turns over the money to the prison overseer this also is credited to the prisoner's account. But when a prisoner in some way secures money and attempts to smuggle same into guard house or concealing same in some part of his clothing, the money is confiscated and credited to prison mess. It is not thought that par. 327, M. G. D., applies to this case. Decision is requested."

Held, that the practice of confiscating money which general prisoners attempt to introduce or smuggle into the prison room or conceal in their clothing is not warranted by law or regulations and should be discontinued; that money so confiscated should be credited to the prisoners from whom it was taken and returned to them upon their release from confinement; and that money so confiscated from prisoners already discharged from confinement should be returned to them if they can be found.

(30-824.3, J. A. G., Mar. 3, 1915.)

PURCHASE OF SUPPLIES: Products sold by civilian employees.

Paragraph 521, A. R., prohibits the purchase of government supplies from persons in the military service, except military publications and maps approved by the War Department, or the making of any purchase or contract in which such person shall be permitted to share or receive benefits.

Held, that this provision does not apply to civilian employees in the government service, and that it was, therefore, permissible to purchase from a clerk in the Quartermaster Corps a "proprietary" product for cleaning shoes.

(76-331.4, J. A. G., May 12, 1915.)

SALVAGE: Rescue of drifting submarine mine.

A submarine mine belonging to the United States broke from its moorings and was found and rescued by fishermen. On the question whether the fishermen were entitled to salvage,

Held, that according to the weight of authority, only such property as pertains to a ship or its cargo is the subject of salvage, and that therefore the rescuers of the submarine mine could not properly be paid for their services upon a claim for salvage.

(5-400, J. A. G., May 4, 1915.)

TRANSPORT SURGEONS: Subsistence at public expense.

An officer of the Medical Corps claimed reimbursement for subsistence during a period that he was on duty as surgeon on an Army Transport, such claim being based upon the provision of Par. 164, Transport Regulations, for the subsistence of "contract surgeons (serving as transport surgeons); the ship's officers; * * * in their respective messes without charge."

Held, that there is no statutory authority for the provision in the Transport Regulations referred to for the subsistence without charge of contract surgeons serving as transport surgeons, or of any commissioned officer of the Medical Corps serving as transport surgeon, and that therefore the officer was not entitled to the reimbursement claimed.

(94-100, J. A. G., May 8, 1915.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

CLAIMS: Loss of vehicle hired by Government employee.

An officer of the Indian Service, Department of the Interior, under instructions to visit a certain Indian Reservation for inspection purposes, hired a team of two horses and buggy to make the trip across country. In his return from the reservation, in attempting to ford a river after heavy rains, the team was swept down stream, resulting in the loss of the buggy, the horses being saved. There was no question that the officer did not exercise reasonable care and judgment in attempting to cross the stream. He considered that the interests of the Government required that he make the attempt. The owner of the buggy put in a claim against the Government for \$74 damages.

Held, that the officer was in a travel status, and was entitled to reimbursement of his actual traveling expenses under the act of March 3, 1875 (18 Stat., 452), excepting subsistence; that he was

not authorized to hire the team for the Government as its agent and presumably did not attempt to do so; that the Government had no part in the contract of hire, and there was no privity of contract between the United States and the claimant, and that therefore the claim was not a valid one against the United States.

(Comp. Geo. E. Downey, May 26, 1915.)

PAY: Foreign service increase to officers and enlisted men.

The Act of June 30, 1902 (32 Stat., 312), provides—

“That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto.”

This act was modified by the Act of August 24, 1912 (37 Stat., 576), which provides—

“That hereafter the laws allowing increase of pay to officers and enlisted men for foreign service shall not apply to service in the Canal Zone, Panama, or Hawaii or Porto Rico.”

The question was presented as to what items of pay are subject to increase for foreign service. *Held*, that when Congress by the Act of June 30, 1902, supra, qualified the word “pay” by the word “proper” it intended some restriction upon the broad interpretation of the word “pay” which might otherwise have been permissible, and that neither the law nor the construction thereof by the Supreme Court in *United States v. Mills* (197 U. S., 223), justifies the view that the increase is payable on additional or extra pay for special assignments or temporary service or on items which are more properly “allowances” than pay. *Decided*, therefore, that foreign service increase of pay is not allowable on the following items,—

(a) Officers.

1. Additional pay for private mounts.
2. Additional pay as aid.
3. 35% increase, aviation service, Act of March 3, 1913.
4. 25%, 50% and 75% increase, aviation service, act of July 18, 1914.

(b) Enlisted men.

1. Additional pay as expert rifleman, sharpshooter, and marksman.
2. Additional pay as first class and second class gunner.
3. Additional pay as casemate electrician, observer, first class, plotter, chief planter, chief loader, observer, second class, gun commander, gun pointer.
4. Additional pay as mess sergeant.
5. 50% increase, aviation service, Act July 18, 1914, except “aviation mechanics.”

This decision will have application to all service rendered after June 30, 1915, the postponement of the operation thereof being

deemed necessary to permit due notice being given disbursing officers so as to avoid possible occasions for disallowances.

(Comp. Geo. E. Downey, May 19, 1915 (21 Comp., 811), as amplified by decisions of June 4 and June 10, 1915.)

NOTE.—The effect of the above decision is to limit the payment of foreign-service increase of pay to pay plus longevity or service pay, including additional pay for certificate of merit, and the 50 per cent increase granted to enlisted men by the Act of July 18, 1914, who hold the rating of "aviator mechanic," and to exclude from the computation of said increase all additional items of pay. All decisions in conflict therewith are overruled.

TRANSPORTATION: Shipment of horses on change of station.

An officer on change of station had household goods and professional books aggregating 9,078 pounds, the shipment of which by the Government was more advantageous as a minimum car load of 12,000 pounds at \$60. The officer also had two horses for shipment at public expense under Par. 1098, A. R., 1913, which could have been shipped in the car with the other property without additional cost to the Government for freight charges, provided they had been shipped at the normal valuation of not more than \$100. Par. 1098, A. R., contained the provision—

"That the shipment shall be made at a valuation of not to exceed \$100 per animal, unless the owner pays, under the regulations of the Quartermaster Corps, the cost incident to increased valuation."

The officer placed a valuation of \$200 each on the horses, as a consequence of which, because of the higher rate of classification, it was necessary to ship them in a separate car at a cost of \$75, but upon the same Government bill of lading with the household goods and books.

Held, that as the cost over and above \$60 on account of this shipment was due to the action of the officer (owner), he, and not the Government, should bear the burden of it.

(Comp. Geo. E. Downey, May 4, 1915.)

BULLETIN 26.

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No. 26. }

WAR DEPARTMENT,
WASHINGTON, July 16, 1915.

The following digest of opinions of the Judge Advocate General of the Army for the month of June, 1915, and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2255370 E—A. G. O.]

By ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Major General, Chief of Staff.

OFFICIAL:

H. P. MCCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

DETACHED SERVICE: Commanding of company by battalion adjutant.

The question was presented whether a battalion adjutant can accumulate eligibility for detached service by commanding a company, and, if so, whether he can at the same time draw forage for his horse. By the Act of February 2, 1901 (31 Stat., 750), it is provided that captains and lieutenants not required for duty with the companies shall be available for detail as regimental and battalion staff officers and such other details as may be authorized by law.

Held, that so long as an officer remains battalion adjutant his primary duties pertain to that office, with which the normal duties of company commander are incompatible; that the detached service law would require that his primary duty be with his company; that if he were required to perform all the duties of company commander he could not perform those mounted duties of battalion adjutant for which the law provides forage and mounted pay, and in such circumstance he would not be entitled thereto; that if he performed such duties of a company commander as were not incompatible with those of battalion adjutant, he would not be entitled to accumulate eligibility for detached service by reason of such duty as a company commander.

(72-350, J. A. G., June 15, 1915.)

DETACHED SERVICE: Detail of a major of infantry as captain of infantry team, national matches.

The Act of April 27, 1914 (38 Stat., 357), forbids the detachment for duty of any kind of any colonel, lieutenant colonel, or major of the line who has not been actually present for duty for at least two

of the last preceding six years with a command composed of not less than two troops, batteries or companies of that branch of the Army in which he holds a commission, and provides:

"That temporary duty of any kind hereafter performed with United States troops in the field for a period or periods the aggregate of which shall not exceed sixty days in any one calendar year * * * shall * * * hereafter be counted as actual presence for duty with such organization or command."

On the question whether a major of infantry who was not eligible for detached service could legally be detailed as captain of the infantry team for the national matches at Jacksonville, Fla., during October, 1915, which would necessitate his detachment for about 50 days,

Held, that the training of an infantry rifle team does not come within the definition of duty with troops in the field contemplated by the statute, but is more nearly allied to garrison instruction; that it is field service only in the sense that the duty is performed out of doors and involves the use of arms, being similar to training in rifle fire upon a range, an adjunct to a post, which service is not regarded as "field service"; that therefore the proposed assignment could not be counted as duty with troops within the meaning of the Act of April 27, 1914.

(6-124, J. A. G., June 5, 1915.)

LINE OF DUTY: Soldier stabbed to death in altercation in which he was the aggressor.

Following a dispute between a corporal and a private, between whom there had been ill feeling for some time, the former, after calling the private a vile name, threw a bucket of water upon him, whereupon the private stabbed his assailant with a case knife, killing him.

Held, that as the corporal's death was the result of an altercation in which he was the aggressor and therefore guilty of an infraction of military discipline, his death should be regarded as having occurred as the result of his own misconduct and not in line of duty.

(54-022.1, J. A. G., June 30, 1915.)

MEDICAL TREATMENT: Expenses for services of osteopathic physician.

An officer of the Army on duty without troops incurred an expense of \$20 for osteopathic treatment and submitted vouchers for payment of the account, assuming that his procedure was authorized by Par. 1476, A. R., which provides in part that when "medical treatment" is required by an officer on duty without troops and it can not otherwise be had, he may "employ the necessary civilian service to furnish the same, and just accounts therefor will be paid by the Medical Department."

Held, that osteopathic treatment is not "medical treatment" within the meaning of the regulation; that as the Medical Department does not provide for osteopathic treatment through its own organization, it is not to be presumed that the regulation is susceptible of an

interpretation that will authorize it; that with the sanction of Congress, the Medical Department of the Army adheres to the ancient school of medicine and surgery; and that therefore all persons in the Army service who require the services of a civilian physician at public expense are limited to the procurement of a physician whose methods of treatment are properly termed the practice of medicine and surgery.

(6-227.6, J. A. G., June 16, 1915.)

- **PAY AND ALLOWANCES:** Forage allowance to retired officers assigned to active duty.

A retired officer of the Army was detailed, with his consent, on active duty in the Army War College as translator, and the question was presented whether he was entitled to forage for his private mount while on such duty. By the Acts of June 17, 1878 (20 Stat., 150), and February 24, 1881 (21 Stat., 347), forage allowance is given to officers who "are required by law to be mounted and actually keep and own their animals."

Held, that as the law does not indicate what officers are "required to be mounted," it rests with the Secretary of War to designate them; that forage for private horses is not a part of the allowances to which an officer is entitled irrespective of the duty to which he is assigned; that the allowance for forage is not a part of the "full pay and allowances" of a retired officer and that he is not entitled thereto unless it has been decided by the Secretary of War that he is performing duty which requires him to be mounted or is employed in one of the capacities mentioned in Paragraph 1272 A. R.

(88-570, J. A. G., June 29, 1915.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

GRATUITY PAY: On death of soldier, designation of beneficiary.

An enlisted man who had duly designated a friend as beneficiary to whom payment should be made of the six months' gratuity pay provided by the Act of May 11, 1908 (35 Stat., 108), and Par. 1385, A. R., subsequently married, but did not thereafter change the designation of his beneficiary "by filling up and forwarding to The Adjutant General of the Army another blank of the prescribed form," in accordance with Par. 1385, A. R. The soldier, while on the active list, died, leaving a will by which, after making certain specific bequests, he disposed of "all the balance of my estate both personal and real, and all debts or money that is due me from any source" to his wife and another person.

Held, that the will did not operate to change the designation of the soldier's beneficiary.

(Comp. Geo. E. Downey, June 7, 1915.)

STATE LAWS: Expenses for inspection of horses.

In carrying out instructions of the Quartermaster General of January 9, 1912, in regard to complying with State sanitary requirements governing the admission of live stock, the proper military authorities deemed it necessary in connection with the shipment of horses and mules from Vancouver Barracks, Wash., to points in California to engage the services of a veterinarian at Vancouver to inspect the animals and issue health certificates therefor. The Auditor for the War Department disallowed the payment to the veterinarian under the supposed authority of previous decisions of the Comptroller (21 Comp. Dec., 450, and others there cited), holding in substance that the instrumentalities of the United States employed in its proper functions are not subject to taxation by a State and that the requirement of the State law of the evidence of the inspection of horses "does not make it the carrier's duty to make or procure the inspection of Government horses en route."

Held, that where the Government acquiesces in the requirements of State laws in this regard and makes its own arrangements for inspection, as was done in the instant case, the expense therefor is properly payable from Army appropriations, and that the decisions relied upon by the Auditor were not applicable.

(Comp. Geo. E. Downey, June 12, 1915.)

TRANSPORTATION: Land-grant deductions for civilian employees.

In the settlement of the accounts of the Atchison, Topeka & Santa Fe Railway Company for transportation service, the Auditor for the War Department disallowed \$36.58 as land-grant deductions from claim for the transportation of two civilian employees of the Signal Corps from San Diego, Cal., to Washington, D. C. On appeal to the Comptroller, the company contended that—

"Civilian employees of this branch of the Army are not a part of the military forces of the United States subject to the orders of the Secretary of War, and can in no way be classed as troops of the United States, under the meaning of the land-grant acts. Such transportation is therefore not subject to land-grant deduction."

Held, that by the Act of February 2, 1901 (31 Stat., 748), the Signal Corps became a part of the Army; that it has been held for more than thirty years that the civilian employees of the Army are troops within the meaning of the land-grant acts, and that therefore the deduction was properly made by the Auditor.

(Comp. Geo. E. Downey, June 24, 1915.)

BULLETIN 30.

BULLETIN }
No. 30. }

WAR DEPARTMENT,
WASHINGTON, August 20, 1915.

The following digest of opinions of the Judge Advocate General of the Army for the month of July, 1915, and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2255370 F—A. G. O.]

By ORDER OF THE SECRETARY OF WAR:

TASKER H. BLISS,
Brigadier General, Acting Chief of Staff.

OFFICIAL:

H. P. McCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ACCOUNTS: Disposition of certified checks received as guaranties.

In the Comptroller's decisions of January 16, 1913 (19 Comp. Dec., 442), and January 9, 1914 (20 Comp. Dec., 479), it was held in substance that all moneys collected by disbursing or collecting officers of which the correct amount due the Government could not be determined at the time of receipt, and refundment is involved, or moneys held in trust by an officer as agent of the Government and not otherwise provided for by law or Treasury regulations, to be subsequently returned in whole or in part to the depositor, should be accounted for to the Auditor as a special deposit account.

Held, that the said decisions of the Comptroller do not require that certified checks accompanying proposals be deposited to the credit of the Treasurer of the United States, since such checks do not represent money belonging to the United States, but are merely a form of guaranty which the contracting officer may retain in his possession until the proper time to return them to the depositors or until collection is required in case of the successful bidder upon default—this being the practice authorized by paragraph 535, A. R., 1913.

(12-124, J. A. G., July 28, 1915.)

DESERTION: Effect of disapproval of court-martial sentence as to expenses for reward and transportation.

An enlisted man upon trial for desertion was found guilty, but the reviewing authority disapproved the sentence because no proper evidence was introduced to show the time and place of apprehension.

Held, that the soldier was entitled to reimbursement of the amount stopped against his pay for payment of the reward for his apprehension (127 A. R., 1913), but that he was properly chargeable with the cost of his transportation from the place of his trial to the station of his organization, which station had been changed during his unauthorized absence, the travel incident to the charge of desertion and for which the soldier was not liable (127 A. R., 1913), having ended at the place of his trial, regardless of whether this was his proper station or elsewhere.

(26-206, J. A. G., July 24, 1915.)

HEAT AND LIGHT COMMUTATION: Allowances when quarters are rented at officer's own expense.

In the Army appropriation act for the fiscal year 1916, provision was made for commutation of heat and light for officers and enlisted men, and the Act of March 2, 1907 (34 Stat., 1167), provides that their heat and light allowances shall be furnished under regulations prescribed by the Secretary of War.

Held, that under the regulations prescribed (Par. 1036 and Par. 1057, A. R., 1913, as amended), officers and enlisted men on temporary duty on the Mexican border who occupy with their families quarters rented at their own expense are entitled to their regular allowances of commutation of heat and light therefor.

(72-313, J. A. G., July 16, 1915.)

MILITIA: Injury to laborer on rifle range; liability.

A laborer employed on a militia rifle range was injured in the course of his employment and the question was presented, in connection with his claim for an award of compensation, as to whether he was an employee of the State or of the Federal Government.

Held, that while laborers employed on militia rifle ranges are paid from federal appropriations (R. S., 1661, as amended), and by a disbursing officer of the United States (32 Stat., 777), they are nevertheless selected, hired and discharged by the State, thus evidencing such plenary control over them as to bring them within the relation of master and servant, employer and employee, and that therefore the laborer was to be regarded as an employee of the State, rather than of the Federal Government.

(16-600, J. A. G., July 20, 1915.)

MARINE CORPS: Convicted enlisted man in Army service, allowances on discharge.

An enlisted man of the Marine Corps during the service of his organization with the Army was sentenced to dishonorable discharge and imprisonment by an Army court-martial. At the expiration of his term of imprisonment the question was presented as to whether he was entitled to transportation and the usual gratuities of clothing and cash payable from Army appropriations.

Held, that the provisions of the Army appropriation act in regard to transportation, clothing and cash for discharged prisoners are sufficiently broad therefor, and that as the law does not provide for

the return of prisoners of the Marine Corps convicted by an Army court-martial while serving with the Army under Section 1621, R. S., to the jurisdiction of the Navy Department where they normally belong, they remain under the jurisdiction of the War Department for all purposes of punishment and discharge the same as similarly convicted enlisted men of the Army, including the allowance of transportation, clothing and cash upon discharge.

(30-824.1, J. A. G., July 3, 1915.)

OFFICERS: Restoration of, from retired list to active list.

In respect to an officer who was restored to the active list from the retired list by the Act of July 17, 1914 (38 Stat., 512), the question was presented upon his restoration to his former rank under the Act of March 4, 1915 (38 Stat., 1068), as to whether he should be carried as an extra officer. The Act of March 4, 1915, referred to, authorizing the President under specified conditions to transfer officers from the retired list to the active list, contained the provision:

"That such officer shall be transferred to the place on the active list which he would have had if he had not been retired, and shall be carried as an additional number in the grade to which he may be transferred or at any time thereafter promoted: * * * *Provided further*, That any officer who may have already been transferred from the retired list to the active list shall receive the benefits of this act."

Held, that the provision that officers restored under the Act of March 4, 1915, shall be carried as additional numbers, indicates an intention on the part of Congress to bring about the restoration of such officers to their former rank without interfering with the rights of promotion that had accrued to officers who had remained in the service, and that while the Act does not expressly provide that an officer theretofore restored should be carried as an additional number, it evidently was the intention of Congress that it should have that effect.

(88-260, J. A. G., July 8, 1915.)

TRANSPORT SERVICE: Stowaways.

A citizen of Honolulu, H. T., presented a bill for \$3.30 for subsistence furnished to three stowaways taken off the United States transport at Honolulu.

Held, that the bill was properly payable from the appropriation for the subsistence of the Quartermaster Corps.

(94-130, J. A. G., July 17, 1915.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

CONTRACTS: Delay in making award.

The Navy Department advertised for proposals for furnishing, among other things, 1,000 rolls of toilet paper to the Naval Academy, the bids to be opened June 23, 1914. The Old Dominion Paper Company submitted a proposal to furnish and deliver within thirty days

of the date of an order the required paper at a given price. Awards were generally made within a few days after the opening of the bids but no award was made for the toilet paper until September 10, 1914, when the Old Dominion Paper Company was advised that its bid was accepted and an order was given for the paper. In the meantime conditions in the paper market had radically changed and the paper company refused to furnish the paper in accordance with its bid. Thereupon the paper was purchased elsewhere at a higher price.

Held, that the department's delay in making the award was unreasonable long in view of its usual practice; that it is well settled law that where no time is fixed within which an offer is to be accepted it will lapse after the expiration of a reasonable time; and that therefore the company was not liable for the difference in the cost of the paper between the price named in its bid and the price paid by the Government for it elsewhere.

(Comp. Geo. E. Downey, July 9, 1915.)

HOSPITAL FUND: Cost of transportation of supplies purchased from; reopening settled accounts.

Under a practice of many years standing the Quartermaster Corps paid the freight charges on hospital supplies purchased from the hospital fund at Fort Bayard, N. Mex. In the settlement of the Quartermaster's accounts covering a portion of the year 1914, the Auditor disallowed such payments on the ground that the expenses were properly payable from the hospital fund. Upon review of the Auditor's action and also as to whether "the military authorities should be called upon to refund any sums heretofore paid for the transportation of articles purchased out of the hospital fund at Fort Bayard, N. Mex., or elsewhere."

Held, that the payment, from funds appropriated for the transportation of the Army, of the freight charges on hospital supplies purchased from the hospital fund resulted in augmenting the hospital fund to that extent and was without authority of law, such charges being properly payable from the hospital fund from which the supplies were purchased. *Held further*, that this rule should not be applied retrospectively so as to disturb closed accounts, but should be applied to any incomplete or open transaction.

(Comp. Geo. E. Downey, Aug. 4, 1915.)

MONEY EXCHANGE: Salaries of officers serving abroad.

The Army appropriation Act of March 4, 1915, for the fiscal year 1916, provides:

"For payment of exchange of acting quartermasters serving in foreign countries * * * \$600."

In considering the application of a similar provision in the Army appropriation Act for the fiscal year 1914 (37 Stat., 709),

Held, that the purpose of said provision was to secure special disbursing agents of the Quartermaster Corps against loss in the cashing or sale of their official checks issued to obtain funds with which to make authorized disbursements, including their own and other salaries; that officers serving abroad if paid in local currency are entitled

to be paid the equivalent of their salaries expressed in United States money and that the difference between this equivalent and what the local currency costs represents the cost of exchange for which the disbursing officer is entitled to credit in his accounts.

(Comp. Geo. E. Downey, July 16, 1915.)

QUARTERS, HEAT, AND LIGHT: Allowances to enlisted men on furlough or temporary duty in the field.

By the Act of March 4, 1915 (38 Stat., 1069), appropriation was made for the payment of commutation of quarters, heat and light to enlisted men of the Army, and as to quarters it was provided:

"That hereafter, at places where there are no public quarters available, commutation for the authorized allowance therefor shall be paid * * *, when specifically authorized by the Secretary of War, to enlisted men at the rate of \$15 per month, or in lieu thereof he may, in his discretion, rent quarters for the use of said enlisted men when so on duty."

The Act of March 2, 1907 (34 Stat., 1167), provides:

"That hereafter the heat and light actually necessary for the authorized allowance of quarters for * * * enlisted men shall be furnished at the expense of the United States under such regulations as the Secretary of War may prescribe."

Held, that an enlisted man entitled to commutation of quarters at his regular station does not lose the right thereto while absent on furlough or temporarily absent on duty in the field, and that if his family continue to occupy his quarters during his absence he is entitled to commutation of heat and light also, the soldier being regarded as constructively at his regular station during said temporary absence.

(Comp. Geo. E. Downey, Aug. 3, 1915.)

TRANSPORTATION: Enlisted man on furlough ordered to duty.

A noncommissioned officer whose organization was stationed at Madison Barracks, N. Y., upon being relieved by orders from the War Department from duty with the New Hampshire National Guard at Concord, N. H., December 31, 1913, was granted a furlough until February 28, 1914, "with permission to go ———;" it being further specified that "the close of the last day of this furlough must find him at such place as the War Department may direct." The soldier went to Chicago, and before the expiration of his furlough, as extended, he was directed by the War Department March 18, 1914, as follows:

"You will report on or before the expiration of your furlough as extended to the Commanding Officer, Madison Barracks, N. Y., for duty."

The soldier applied to the military authorities at Chicago for transportation but was advised, in view of doubt as to whether he was entitled thereto, to pay his own fare and apply for reimbursement, which he did.

Held, that the principle applicable was to be found in par. 1294, A. R., 1913, reading as follows: "An officer relieved from duty at a

station and granted leave of absence before assignment to another, who receives an order of assignment before expiration of leave, is entitled to mileage from the place where he receives the order to his new station"; that while this regulation applies in terms to officers only, the principle should govern this case and that therefore the soldier was entitled to reimbursement of his travel expenses in an amount equal to what it would have cost the Government to transport him from the place where he received the order of March 18, 1914, to his proper station.

(Comp. Geo. E. Downey, June 2, 1915.)

BULLETIN 32.

BULLETIN }
No. 32. }

WAR DEPARTMENT,
WASHINGTON, *September 10, 1915.*

The following digest of opinions of the Judge Advocate General of the Army for the month of August, 1915, and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2255370 H—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Major General, Chief of Staff.

OFFICIAL:

H. P. McCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

A CORRECTION.

On page 5 of Bulletin No. 18, War Department, 1915, line 11, change "Manual for the Pay Department" to read "Army Regulations."

COMMAND: Detail of staff officer as officer of the day.

The question was presented whether under existing regulations an officer serving a detail in the Quartermaster Corps may be required by his post commander to act as officer of the day. Paragraph 18, A. R., 1913, provides that a staff officer, "though eligible to command, according to his rank, shall not assume command of troops unless put on duty under orders which specially so direct, by authority of the President."

Held, that service as officer of the day involves command of troops, and that the detail by a post commander of an officer of the Quartermaster Corps for that duty would be in violation of existing regulations.

(20-012.2, J. A. G., Aug. 16, 1915.)

DETACHED SERVICE: Officers on duty in command of guard.

Two officers with rank of first and second lieutenant, respectively, were ordered to duty from Fort Hamilton, N. Y., with a detachment composed of 51 enlisted men, 10 from each of their companies and 3 other companies at Fort Hamilton and 1 from the Hospital Corps, and the question was presented whether the officers while on such duty should be regarded as on duty with their companies under the detached service law (37 Stat., 571).

Held, that since the officers were not detailed for the performance of *company* duties or sent in command of detachments from *their* companies, but for general duty with the detachment as a whole or as a single detachment from Fort Hamilton, which duty was not incident to nor flowed from their company relations, they could not properly be regarded as present for duty with their companies in the sense of the detached service law.

(6-124.22, J. A. G., Aug. 26, 1915.)

ENLISTMENT: Eligibility of applicant with record of commitment for truancy.

Paragraph 849, A. R., 1913, forbids the enlistment, among others, of persons "who have been imprisoned under sentence of a court in a reformatory, jail, or penitentiary."

Held, that this provision does not apply to commitments for truancy, and that therefore an applicant who "was committed for 422 days to the New York Parental School on account of truancy" was not ineligible for enlistment because of said commitment.

(34-081, J. A. G., Aug. 6, 1915.)

MAIL MATTER: As to registration and insurance.

In view of the ruling (Bul. 18, W. D., 1915, page 4) that there was no authority for furnishing stamps for parcel post insurance, the question was presented whether the registration of mail matter should be regarded as insurance and the issuing of stamps therefor governed by the said ruling.

Held, that the registration of mail matter is not for the purpose of providing ordinary indemnity insurance such as is contemplated in the case of insurance of parcel post packages, which are carried and treated as ordinary mail, but that the primary object of registration is to avail of the special or superior *service* designed to secure the safe delivery of the mail matter itself, the use of which service is well established in all branches of the Government, and that therefore postage might properly be furnished for the registration of mail matter when necessary in the Army service.

(5-240, J. A. G., August 12, 1915.)

OFFICERS: Examinations for promotion.

A first lieutenant who failed in a mental examination for promotion to the grade of captain and was suspended from further examination for a year, according to law, graduated from the Coast Artillery School during the said year of suspension, receiving certificates of proficiency in all subjects. He desired to know whether he would be exempt from further examination in the subjects covered by such certificates, and also whether he would be required to take examination in the subjects in which he qualified on his previous examination.

Section 3 of the act of October 1, 1890 (26 Stat., 562), provides, *inter alia*, that the President will prescribe a system of examination of all officers of the Army below the rank of major to determine their

fitness for promotion, and that an officer failing on a mental examination shall be suspended from promotion for one year and then be reexamined. The regulations applicable are contained in General Orders, No. 14, War Department, April 25, 1912, paragraph 28 of which exempts certain officers from examination "as to their professional fitness for promotion to the next higher grade under the conditions and with the limitations hereinafter set forth." Among those listed are graduates of the Coast Artillery School who are exempt for four years from the date of graduation "in all subjects which they have pursued satisfactorily at that school." Paragraph 34 of the order directs that "the procedure prescribed in this order for the examination of officers for promotion will be followed in the reexamination of officers suspended from promotion."

Held, that upon reexamination the officer would be exempt from examination in the subjects covered by his Coast Artillery School diploma, subject to the limitations set forth in paragraph 28, G. O. No. 14, W. D., 1912, although he may have failed on such subjects in his former examination, but that he would not be exempt from examination on any subject by reason of having qualified therein on his previous examination.

(64-221.4, J. A. G., Aug. 30, 1915.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

CIVILIAN EMPLOYEES: Temporary promotions.

The first deck officer of an Army transport was granted leave of absence without pay and it was proposed to fill the "vacancy" by temporary promotions from the lower grades. Section 12 of the Sundry Civil Appropriation Act of August 1, 1914, provides:

"That it shall not be lawful hereafter to pay to any person, employed in the service of the United States under any general or lump sum appropriation, any sum additional to the regular compensation received for or attached to any employment held prior to an appointment or designation as acting for or instead of an occupant of any other office or employment. This provision shall not be construed as prohibiting regular and permanent appointments by promotion from lower to higher grades of employments."

Held, that the first officer while in the status of absence on leave without pay was still in the transport service and that so long as he remained in that status a "temporary promotion" of the second officer could not be a promotion to a *vacancy*, but in effect a designation of the second officer as acting first officer, and that as the object sought was to give the lower officer the higher pay, the prohibition of the statute would apply. *Held further*, that temporary promotions are not prohibited by the statute where vacancies exist.

(Comp. Geo. E. Downey, Aug. 12, 1915.)

TRANSPORTATION: Discharge of enlisted man.

A soldier who had enlisted at Fort Logan H. Roots, Ark., was discharged at Galveston, Tex. The official distance between the place of enlistment and the place of discharge, for purposes of transporta-

tion, was found to be 519 miles. The soldier requested transportation to Mobile, Ala., or as far in that direction as his 519 miles entitled him to travel. The distance to Mobile, by the Official Table of Distances, was found to be 551 miles, or 32 miles farther than from Galveston to Fort Logan H. Roots. By a short-line, however, computed in part from the Railway Guide, the distance to Mobile was found to be 496 miles, and the soldier was furnished transportation over the shorter route to Mobile, at a cost of \$15.45. The cost of transportation to Little Rock, Ark., the nearest station to the place of enlistment, would not have exceeded \$10.43, and the auditor disallowed \$5.02 in the settlement of accounts.

Held, that the distance for which the transportation was furnished (496 miles) did not exceed the distance (519 miles) from the place of the soldier's discharge to the place of his enlistment (37 Stat., 576), and that as transportation not exceeding such distance was required to be furnished, without regard to the cost (Bul. 1, W. D., 1913, page 33), the entire sum of \$15.45 was properly disbursed therefor.

(Comp. Geo. E. Downey, Aug. 20, 1915.)

TRANSPORTATION: Immigrant rates on troop property and equipment.

In the settlement of the accounts of a railway company for transportation of 15,121 pounds of equipage and troop property from Wingate, N. Mex., to Albuquerque, N. Mex., and 114,789 pounds (4 cars) from Fort Bliss, Tex., to Wingate, N. Mex., the Auditor for the War Department applied the rate authorized for immigrant movables and household goods. The railroad company contended that the immigrant rate was not applicable and that settlement should be made on the basis of the rates applicable for the specific items embraced in the shipment, for the reason, among others, that "the immigrant movables rate is applicable to shipment of persons moving into a new country for the purpose of settling and development, and the purpose of a movement of troop property and military stores can not be placed in the same class as that of an intended settler."

Held, that the shipment consisted of articles which, had they belonged to private individuals, would have been entitled to the rate for immigrant movables and household goods; that because they belonged to, or were in the custody of, the Government was no reason for any higher transportation charges thereon; that it is established by rulings of the Interstate Commerce Commission, and of the courts, that the rate applicable for shipment is not dependent upon the owner of the goods or the purpose for which the articles are to be used, but of the class of articles embraced in the shipment. Action of the Auditor affirmed.

(Comp. Geo. E. Downey, Aug. 11, 1915.)

BULLETIN 36.

BULLETIN]
No. 36. }

WAR DEPARTMENT,
WASHINGTON, November 10, 1915.

The following digest of opinions of the Judge Advocate General of the Army, for the months of September and October, 1915, and of certain decisions of the Comptroller of the Treasury and courts, together with a collection of notes on military justice prepared under the direction of the Judge Advocate General of the Army, is published for the information of the service in general.

[2255370, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Major General, Chief of Staff.

OFFICIAL:

H. P. McCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ATTORNEYS: Employment of.

A certain military attaché obtained the services of an attorney abroad in preparing a lease for an office room.

Held, that in view of section 189, Revised Statutes, which provides that "no head of a department shall employ attorneys or counsel at the expense of the United States; but when in need of counsel or advice, shall call upon the Department of Justice, the officers of which shall attend to the same," the War Department could not authorize the payment of the attorney's fee.

(5-212, J. A. G., Oct. 16, 1915.)

COURTS-MARTIAL: Soldier sentenced to dishonorable discharge while serving a prior sentence; cumulative sentences.

An enlisted man was convicted by special court-martial and sentenced to confinement at hard labor for six months and forfeiture of two-thirds of his pay for the same period. Shortly after the execution of this sentence was begun, the soldier was convicted by general court-martial and sentenced to dishonorable discharge and three days' confinement at hard labor. The question was submitted whether the execution of the general court-martial sentence should be deferred until the sentence of the special court-martial was fully executed so as to make the sentences cumulative, or whether it was required to be executed forthwith. Doubt arose because of the apparent conflict between paragraph 973, A. R., 1913, and paragraph 10, page 73,

of the Manual for Courts-Martial, as well as because of uncertainty as to the requirements of paragraph 152, A. R.

Paragraph 973, A. R., directs that when soldiers awaiting result of trial or undergoing sentence commit offenses for which they are tried, the second sentence will be executed upon the expiration of the first. Paragraph 10, page 73, Manual for Courts-Martial provides that where a soldier, while undergoing sentence of confinement imposed without dishonorable discharge, is tried for a further offense and sentenced to dishonorable discharge and confinement, the period of confinement under his prior sentence will terminate upon the date of his dishonorable discharge, leaving to be executed only the confinement imposed by the second sentence.

Held, that paragraph 973, A. R., and the provision of the Manual for Courts-Martial should be so construed as to give effect to both if possible and that this can be done only by giving literal effect to the provision of the Court-Martial Manual, which would result in negating paragraph 973, A. R., in but one class of cases, namely, where the soldier is serving a sentence of confinement not involving dishonorable discharge as in the instant case, leaving the paragraph free to operate in all other cases coming within its terms. *Held further*, that under paragraph 152, A. R., a soldier is presumed to receive notice of discharge on the day of the arrival of the general court-martial order at his post.

(28-420, J. A. G., Oct. 5, 1915.)

DESERTION: When soldier is liable for the amount of reward.

A deserter from the Army was apprehended and instead of being tried by court-martial was discharged "by reason of desertion and physical unfitness for service," under paragraph 126, A. R., as amended. Thereafter he applied for refundment to him of \$50 stopped against his final pay to cover the amount paid as a reward for his apprehension.

Held, that the stoppage in question was unauthorized and should be refunded to the claimant, since stoppage against the pay of a soldier to cover the cost of his apprehension as a deserter and return to military control is authorized only (a) upon the actual conviction of the soldier of desertion by court-martial, or (b) upon his admission of the crime of desertion preliminary to his restoration to duty without trial. (127 and 131, A. R.)

(26-464, J. A. G., Oct. 16, 1915.)

ENLISTED MEN: Travel without troops; Pullman car accommodations.

On the question of what constitutes traveling without troops within the meaning of paragraph 1128, A. R., relating to the furnishing of Pullman car accommodations to enlisted men,

Held, that the term "troops" in said regulation contemplates an organization of some description under proper command; that usually in the case of a detachment under the command of an officer the object of travel is the performance of some special duty, although it may be otherwise, as in the case of a recruiting party; that, there-

fore, when enlisted men perform travel not within an organization of some description under proper command, they are to be regarded as traveling without troops.

(94-240, J. A. G., Sept. 18, 1915.)

HEAT AND LIGHT: Enlisted man on temporary duty in the field.

In an opinion published in Bulletin No. 5, page 5, War Department, 1915, the Judge Advocate General held that a noncommissioned officer on temporary duty in the field was not entitled to heat and light allowances for his family at his regular station. Subsequently the Comptroller held that an enlisted man entitled to commutation of quarters at his regular station did not lose his right thereto while absent on furlough or temporarily absent on duty in the field, and that if his family continued to occupy his quarters during his absence he was entitled to commutation of heat and light also.

A soldier who had paid for fuel and light under the Judge Advocate General's ruling applied for refundment of the amount so paid in view of the Comptroller's decision.

Held, that there is nothing in the statute on the subject to justify a difference in practice in providing heat and light allowances in kind from that pertaining to commutation of those allowances, and that the practice in regard to furnishing such allowances in kind should be changed to conform to the comptroller's ruling in respect of commutation thereof.

(72-411, J. A. G., Sept. 30, 1915.)

NOTE.—Under the changed construction it was held by the comptroller in a decision of October 11, 1915, that the amount in question collected from the soldier for fuel and light furnished his family at his regular station during his temporary absence on duty in the field could properly be refunded to him from the appropriation to the credit of which it was deposited, as a refundment of money erroneously collected.

MEDICAL RESERVE OFFICERS: Computation of time for longevity increase.

An officer of the Medical Reserve Corps was at the time of his appointment thereto a contract surgeon. He accepted his appointment March 6, 1915, and was not assigned to active duty thereunder until March 16, 1915. In the interim he continued to serve as contract surgeon.

Held, that under the act of April 23, 1908 (35 Stat., 68), the pay status of an officer of the Medical Reserve Corps does not commence until he is called into active duty; and that as the officer in the instant case was not assigned to active duty as an officer of the Medical Reserve Corps until March 17, 1915, his service for the purpose of longevity increase began on the later date.

(6-227.4, J. A. G., Sept. 2, 1915.)

NAVIGABLE WATERS: Right of United States to use of river bed.

In connection with improvements along the Mississippi River in aid of navigation, the United States obtained sand and gravel from bars in the river for use in paving the river banks. The riparian owners demanded payment for the material.

Held, that the United States has a paramount right under the commerce clause of the Constitution to use the bed of navigable streams for any purpose designed to improve the navigation of the stream without compensation to the riparian owners, and that there was no obligation to make payment in this case.

(62-120, J. A. G., Oct. 27, 1915.)

TOURS OF DUTY LAW: Leaves of absence.

In reference to the act of March 4, 1915, providing that no officer or enlisted man of the Army shall, except upon his own request, be required to serve in a single tour of duty for more than two years in the Philippine Islands.

Held, that leaves of absence spent in the Philippine Islands by an officer serving there should not be omitted in reckoning the length of his tour of duty, but that any time during which he is absent from the islands, from whatever cause, may properly be excluded.

(92-400, J. A. G., Oct. 4, 1915.)

TRANSPORTATION: Gasoline for officer's private automobile used in Government service.

A first lieutenant in the Engineer Corps who had charge of a field detachment operating in two parties about five miles apart used his private automobile in the performance of his official duties, instead of a team of mules which he returned to the Quartermaster Corps. He requested that he be furnished gasoline and lubricating oil for his automobile, pointing out in support of his request the advantages accruing from the use of his automobile.

Held, that there is no authority of law for furnishing gasoline and lubricating oil for use in a privately owned and operated automobile; that Congress has provided the means of transportation for the Army which can not be varied; that the provision in the current Army appropriation act for the hire and operation of vehicles "required for the transportation of troops and supplies and for official, military, and garrison purposes," evidently contemplates that vehicles used in the public service, at public expense for operation, must be operated under the jurisdiction of the Government either as owned or hired vehicles. *Held further*, that the hire of the automobile from the officer in the instant case would be contrary to paragraph 521, A. R.

(94-012, J. A. G., Sept. 10, 1915.)

TRANSPORTATION: Officer's baggage allowance on change of station.

By an order of January 14, 1915, an officer with rank of captain was directed to change station from Washington Barracks, D. C., to St. Louis, Mo., effective March 1, 1915. On April 10, 1915, the officer was promoted to major with rank from February 28, 1915, or one day prior to his leaving for St. Louis under the orders mentioned. His household goods were not shipped until August 28, 1915, and the

question was presented whether he was entitled to a captain's or a major's allowance in respect of such shipment.

Held, that the shipment of an officer's baggage is an allowance in kind; that the officer's commission was retroactive for the purpose of pay and fixed allowances but not as to allowances in kind (19 Comp. Dec., 414); and that as the officer was actually a captain at the time the travel was performed and would have been entitled only to a captain's allowance had the shipment been coincident with his change of station, which is the normal procedure, his rights in the matter were governed by the conditions actually existing at the time of the performance of the travel, which entitled him only to a captain's allowance.

(94-233, J. A. G., Sept. 13, 1915.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

APPROPRIATIONS: Transportation charges on condemned horses issued to Militia.

By the act of March 4, 1915 (38 Stat., 1072), provision was made for the purchase of horses for the Organized Militia from funds appropriated by section 1661, Revised Statutes, and provision was further made for issuance to the militia, without cost to the State, of condemned Army horses which are no longer fit for service but may still be suitable for purposes of instruction. The current Army appropriation act under the heading "Transportation of the Army and its supplies" provides "for transportation * * * of supplies furnished to the militia for the permanent equipment thereof, * * *."

Held, that the latter provision did not embrace horses, but referred to the transportation of supplies authorized to be furnished to the militia under section 17 of the act of January 21, 1903 (32 Stat., 778); and that the cost of the transportation of condemned horses issued to the militia was properly payable from the militia funds provided by section 1661, Revised Statutes.

(Comp. W. W. Warwick, Sept. 30, 1915.)

ARMY RESERVE: Transportation allowances of enlisted men when furloughed to the Reserve.

The act creating the Army Reserve (37 Stat., 590) provides in part that—

"Hereafter the Army Reserve shall consist of all enlisted men who after having served not less than 4 years with the organizations of which they form a part shall receive furloughs with pay or allowances until the expiration of their terms of enlistment, together with transportation in kind and subsistence as provided for by this act in the case of discharged soldiers, * * *."

The provision referred to in the same act "in the case of discharged soldiers" authorizes the furnishing of transportation in kind and subsistence *or*, in lieu thereof, two cents a mile, exclusive of sea travel, to discharged enlisted men.

Held, that the language "together with transportation in kind and subsistence as provided for by this act in the case of discharged soldiers" evidently was intended only to identify the general provisions of law applicable, and was not intended to limit the privileges and allowances of soldiers receiving furloughs to the Army Reserve to transportation in kind and subsistence, and that they are therefore entitled to receive two cents a mile in lieu of transportation in kind and subsistence, in the same manner as is provided for in the case of enlisted men upon their discharge from the service.

(Comp. W. W. Warwick, Oct. 16, 1915.)

AVIATION SERVICE: Pay of officer while on leave of absence.

The act of July 19, 1914 (38 Stat., 514), creating the Aviation Section of the Signal Corps and providing for the detail of officers thereto, grants a "junior military aviator" an increase of 50 per centum in the pay of his grade and length of service under his line commission "while on duty requiring him to participate regularly and frequently in aerial flights." The increase is 75 per centum in the case of "military aviators."

Held, that the right to the increased pay of 50 per centum, or 75 per centum, is dependent upon *duty* rather than upon *detail* alone, and that therefore an officer is not entitled to the increase for time during which he is on leave of absence.

(Comp. W. W. Warwick, Sept. 21, 1915.)

CHECKS: Issuance of second original, as distinguished from duplicate, when original is lost.

The question was submitted by the Secretary of the Treasury whether it is proper to permit a disbursing officer to issue a *second original* check when the original check is lost, stolen, or destroyed.

Section 3646, Revised Statutes, as amended (35 Stat., 643), provides in substance, *inter alia*, that whenever any original check issued by a disbursing officer has been lost, stolen, or destroyed, the Secretary of the Treasury may authorize the disbursing officer, after the expiration of six months and within three years from the date of the lost check, to issue a duplicate upon the execution of a prescribed indemnity bond; provided, that if the original check was not for more than \$50 a duplicate may be authorized after 30 days and within three years.

Held, that while disbursing officers are not prohibited by statute from assuming the responsibility resulting from the issuance of a second original check, the propriety of so doing is under the control of the accounting officers and not within the discretion of a disbursing officer, nor for the regulation of the department for which he is acting. *Held further*, that the procedure prescribed by the statute should be followed, and no second original check should be issued even though the lost check be one which the disbursing officer has drawn in his own favor.

(Acting Comp. Treas., Oct. 29, 1915.)

COURTS-MARTIAL: Effect of sentence as to forfeiture of pay.

The following question was submitted for the Comptroller's decision: When an enlisted man of the Army is sentenced under the provisions of G. O. 70, War Department, September 23, 1914, to forfeit, say, one-half or two-thirds of his pay per month, or pay for 15 days, should the following items of pay be considered in computing the amount of such forfeiture?

(1) Additional pay as expert rifleman, sharpshooter, and marksman.

(2) Additional pay as first-class and second-class gunner.

(3) Additional pay as casemate electrician, observer, first class, plotter, chief planter, chief loader, observer, second class, gun commander, gun pointer.

(4) Additional pay as mess sergeant.

(5) Fifty per cent. increase aviation service, act of July 18, 1914, including increase provided for "aviation mechanic."

(6) Twenty per cent. increase of pay for foreign service under the act of June 30, 1902 (32 Stat., 312), as modified by the act of August 24, 1912 (37 Stat., 576).

(7) Pay for certificate of merit.

Held, that each of the various items mentioned constitutes a part of the soldier's "pay" as that term is generally understood, and that in the absence of an express stipulation to the contrary a court-martial sentence forfeiting all or a fractional part of a soldier's pay for a specified period must be held to include all such items.

(Comp. W. W. Warwick, Oct. 22, 1915.)

NOTE.—The above decision is distinguished from the Comptroller's decision of May 19, 1915 (published in Bulletin 21, page 11, War Department, 1915), to the effect that the term "*pay proper*" as used in the foreign service pay act of June 30, 1902, does not include extra pay allowed for special assignments. It does not follow that because such extra pay is not "*pay proper*" within the meaning of the act of 1902, it can not be regarded as *pay* within the meaning of a sentence forfeiting a soldier's pay or a part thereof for a specified period. It will be noted also that the present decision is in harmony with the practice of the service. (See Par. 958, Manual for the Pay Department, 1910.)

TRANSPORTATION: Basis of freight charges when weight of shipment shrinks en route from natural causes.

A shipment of hemp by the Navy Department from Manila, P. I., to Boston, Mass., by commercial liner was found upon receipt at destination to have shrunk in weight en route, and the question was presented whether the freight charges should be reckoned upon the weight of the hemp at Manila or upon its weight at its destination. The amount of shrinkage was 2,369 pounds on an initial shipment of 223,424 pounds, and it was evident that the shrinkage was due to natural causes and not to actual shortage or to improper service on the part of the transportation company.

Held, that the company having transported under the usual conditions affecting marine shipments the amount of hemp which it

undertook to carry, and there being no question of negligence nor as to accuracy of the weight, the discrepancy in weight being entirely due to shrinkage from natural causes, the freight charges should be reckoned upon the initial weight at the point of shipment. There was nothing to the contrary in the contract of shipment.
(Comp. W. W. Warwick, Oct. 11, 1915.)

TRANSPORTATION: Excess baggage on change of station.

An officer on change of station had 13,915 pounds of household goods, professional books, and a surrey, loaded in one car and paid for on a carload basis at the rate of 56 cents per cwt. In addition he had an automobile weighing 1,600 pounds shipped in another car at \$2.52 per cwt. The officer's regulation allowance, including the professional books, was 7,690 pounds. It was contended that the proper method of determining the excess charges was to treat the shipment as an entirety and to proportion the aggregate expense on the basis of weight for which the Government and the officer each was responsible.

Held, that the officer's regulation allowance being less than a carload the cost required to be paid by the Government was the proportion of the car load shipment of which it formed a part, and that the excess consisted of 6,225 pounds loaded in the same car with the regulation allowance and the automobile loaded in another car.
(Comp. W. W. Warwick, Oct. 22, 1915.)

COURT DECISION.

(Digest prepared in the office of the Judge Advocate General.)

MARINE CORPS: Jurisdiction of naval court-martial to try marine for an act committed while he was detached for service with the Army.

A private of the Marine Corps, while his brigade was detached for service with the Army, committed an act made an offense both by the rules and Articles of War and by the laws and regulations for the government of the Navy. The next day his brigade was withdrawn from detached service with the Army and he was brought before a naval court-martial for trial, was tried, convicted, and sentenced for the offense as a violation of the laws and regulations of the Navy. At the trial he objected to the jurisdiction of the court upon the ground that at the time the offense was charged to have been committed he, as a private in a brigade of the Marine Corps, was serving with the Army, and that under section 1621, Revised Statutes, he was not subject to the laws and regulations of the Navy, which objection was overruled. He sued out a writ of habeas corpus.

Held, that the accused was not subject to the rules and regulations of the Navy when he committed the offense charged, and that a naval court-martial was without authority of law to impose or enforce the sentence pronounced.

(*United States ex rel. Davis v. Waller*, 225 Fed., 673.)

NOTES ON ADMINISTRATION OF MILITARY JUSTICE.

(Prepared under the direction of the Judge Advocate General of the Army upon the review of records of general courts-martial trials.)

The admonition to the service respecting the administration of military justice, contained in Army Regulations of 1835, is deemed by the Department to be of special relevancy to existing conditions and is here published for the information and guidance of all concerned.

"The discipline and reputation of the Army are deeply involved in the manner in which military courts are conducted and justice administered. The duties, therefore, that devolve on officers appointed to sit as members of courts-martial, are of the most grave and important character—that these duties may be discharged with justice and propriety, it is incumbent on all officers to apply themselves diligently to the acquirement of a competent knowledge of military law; to make themselves perfectly acquainted with all orders and regulations, and with the practice of military courts."—*Par. 1, Art. 35, A. R., 1835.*

CHARGES: As to certainty in alleging place of crime.

In a case recently tried in the Philippine Department the specification of which the accused was convicted alleged that the crime was committed "on board the U. S. A. T. *Thomas*." An allegation such as this, which does not specify whether the vessel was in a port or at sea, might in a case where there is a question as to whether or not the offense of which the accused is convicted is punishable under the local law by confinement in a penitentiary, be an embarrassment in determining upon the proper disposition of the prisoner, and, in any case, is unsatisfactory.

DESERTION: No defense that soldier intended to go and did go to another post.

In a case tried in the 2d Division the accused, who was tried for desertion, was found guilty of absence without leave only, although the evidence was clear that he left his place of duty with intent not to return and surrendered at another post. The reviewing authority in returning the record for revision of findings and sentence properly remarked that the fact that the accused may have intended to go and did go to another post did not change the character of his act.

FINDINGS, IMPROPER: Evidence of lack of care on the part of members of the court.

In a case recently tried in the Southern Department the record was returned by the reviewing authority for revision of the findings and sentence, the former for irregularity, and the latter because such sentence would have retained in the service a man convicted of a crime involving moral turpitude.

The accused in this case was tried, *inter alia*, for desertion, and the findings under that charge were as follows:

"Of the specification 1st charge 'not guilty, but guilty of absence without leave.' Of the 1st charge 'not guilty, but guilty of the 32d Article of War.'"

These findings were made by a court, the majority of whose members were officers of long experience, and are explainable only on the supposition that no member was sufficiently interested in the preparation of the record to see that it was free at least from such palpable errors as here noted.

FINDINGS, IMPROPER: Resulting in unnecessary delays.

In a case recently tried in the Philippine Department the court found the accused guilty of a properly drawn specification under the 21st Article of War and then proceeded to find not guilty of the charge but guilty of conduct prejudicial to good order and military discipline. Upon return of the record by the reviewing authority for correction the court instead of revoking its former finding of the specification and proceeding to a new finding thereof merely excepted the word "wilfully" in the finding under the specification. Because of the latter meaningless finding it was necessary to return the record a second time for correction. The court was composed of officers of considerable length of service. The case is an example of the unnecessary delay caused by want of care on the part of the court.

FINDINGS, IMPROPER: Trials for desertion, absence without leave.

In a case recently tried in the 2d Division the evidence showed that the accused, who was tried upon a charge of desertion and found "not guilty," was in fact absent without leave. The record was returned by the reviewing authority for revision in this regard which was accomplished. Except in rare cases the evidence in a trial for desertion shows that the accused is guilty of the included offense of absence without leave at least, and that he merits proper punishment for such absence. The occasional failure of courts in such cases to find and sentence accordingly is one of the causes of the protracted average periods between arrest upon charges and entering upon the execution of sentence noted in annual reports of Judge Advocate General for 1913, 1914, and the current year.

INSANITY: As an issue should be determined when raised in a trial.

In a case recently tried in the Eastern Department the evidence of record was such as to raise a doubt as to the full mental responsibility of the accused, who was convicted of disrespect to a medical officer and of disobedience of the officer's orders. The officer himself testified that he did not see how the accused could talk the way he did and be otherwise than insane, and the accused testified that he had been an inmate of the Government Hospital for the Insane. It was the duty of the court to instruct the judge advocate to submit such evidence as was available as to the mental responsibility of the accused, and if, upon the whole evidence, the court had reasonable doubt as to his mental responsibility, he should have been acquitted. The trial proceeded, however, to conviction and sentence, in which

the court exhibited its own doubt as to the full mental responsibility of the accused by awarding him a punishment wholly inadequate for the serious offenses of which it convicted him. The unexecuted portion of the sentence in this case was remitted by the Secretary of War.

JUDGE ADVOCATE: Failure in his duties, resulting in miscarriage of justice.

In his action upon the record of a general court-martial a reviewing authority recently disapproved the findings of guilty upon two specifications, in which forgery of the payees' names as indorsements on two Government checks was alleged, because of a lack of evidence to sustain the findings; and he remarked that a miscarriage of justice had resulted in that case because of failure of the trial judge advocate to try the case properly.

While the record does not disclose what additional material evidence could have been secured, it is believed from the record that such evidence was available; it does appear, however, that the presentation of the case by the judge advocate was most unskillful and not in accordance with the approved practice. He introduced and examined witnesses, whose attendance was evidently procured at great expense to the Government, and it is apparent that he failed to elicit from them all pertinent evidence within their knowledge. It is also seen that this case was regarded as of such importance as to render necessary the attendance of a witness from the office of the Auditor for the War Department, who traveled several hundred miles, in order to have before the court the original checks in question, yet the judge advocate neither read the checks as evidence before the court nor did he append copies thereof to the record. The original checks should have been submitted with evidence as to the signatures, and copies thereof, preferably photographic copies, should have been made and appended to the record.

The record states: "The judge advocate then exhibited to the court, as evidence for the prosecution, two signatures of the accused, which were admitted by him to be signatures in his own handwriting." No other evidence of such admission by the accused is shown. Neither the signatures nor copies thereof were appended to the record.

The record exhibits such an inadequate performance of duty on the part of the judge advocate as is inexcusable in any officer of the Army.

JUDGE ADVOCATE: Failure in his duty, record encumbered by irrelevant testimony.

In a case recently tried at Fort Mills, Corregidor, P. I., the reviewing authority remarked in its action that "It is evident that the judge advocate did not properly prepare his case and present it to the court in an orderly and logical manner." The occasion for this remark is one not infrequently observed in records, and arises from the fact that the trial judge advocate fails to interview his witnesses before putting them on the stand, and thereby inform himself as to their exact knowledge of the facts in the case, with the result that much irrelevant testimony is introduced which serves only to encumber the record and confuse the issues of fact to be tried.

JUDGE ADVOCATE: Failure in his duty to produce evidence.

In a case recently tried at Camp Stotsenburg, P. I., the accused was charged with desertion and remaining absent in desertion until apprehended by the Philippine Constabulary. He pleaded not guilty, which cast the burden of proof of every allegation of the specification upon the prosecution. He was found guilty of absence without leave only and retained in the service. The trial judge advocate failed to secure the attendance of the constabulary officer or soldier connected with the apprehension or surrender of the accused, or his deposition, but instead, stated to the court that upon investigation he was satisfied that instead of being apprehended, as stated in a letter from the senior inspector of constabulary, the accused delivered himself up for transportation to a post, and that a deposition from the inspector was not considered necessary. The court accepted this statement and permitted the trial to proceed without the testimony of the constabulary officer. The evidence in this case tended so strongly to prove that the accused intended to desert that the circumstances concerning his return to military control were material and important matters which should have been laid before the court, and the reviewing authority in returning the record for revision properly characterizes the action of the court and trial judge advocate as error.

PLEA OF GUILTY: Accused given erroneous information by court respecting punishment.

It is observed in a recent case that a reviewing authority commented upon the error of the president of a general court-martial, who, upon a plea of "guilty" having been entered by an accused, made an erroneous statement to the latter as to the limit of punishment possible for the offense of which he had pleaded guilty. The president informed the accused that such limit was "confinement at hard labor for three months and forfeiture of pay for two-thirds of that period;" whereas, the maximum limit was dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for one year.

Proper regard for the rights of the accused, though he be assisted by counsel, demands the exercise of more care than was here displayed by the president of the court.

In two cases recently tried in the Eastern Department, the accused, under a charge of desertion, pleaded not guilty of desertion but guilty of absence without leave. The president of the court informed the accused in a general way, but without reference to the case in hand, that a plea of guilty to any offense was an admission of guilt and that in so pleading he subjected himself to such punishment as might be deemed adequate by the court. The meaning of the plea of the accused and the extent of punishment to which it might subject him were, therefore, not adequately explained, and the reviewing authority properly remarked in orders upon the failure to comply with the requirements of section 8, Paragraph II, of G. O. 70, W. D., 1914, that:

"In each case tried by a general court-martial in which the accused enters a plea of guilty it shall appear of record that the meaning

of his plea and the extent of the punishment to which it may subject him was adequately explained to the accused by the president of the court, and that the accused was, after such explanation, asked if he desires to have the plea of guilty stand. If he replies in the affirmative, the plea of guilty will stand; otherwise, a plea of not guilty will be entered. The explanation of the president and the reply of the accused thereto shall appear upon the record of trial. The same rule will apply in cases tried by special court-martial when the evidence heard is made of record."

In a case recently tried in the 2d Division the accused pleaded guilty to absence without leave for three days, the maximum punishment for which is confinement at hard labor for nine days and forfeiture of six days' pay. The president of the court in explaining to the accused that upon proof of five or more previous convictions, dishonorable discharge with forfeiture of all pay and allowances was authorized in this case, added:

"The court may also, by custom of the service, properly adjudge in addition, confinement at hard labor for three months."

These added remarks were erroneous in two particulars, viz, as to the period of confinement authorized in the particular case, and in stating that the authority therefor was "custom of the service."

The error of the president was remarked upon by the reviewing authority in his action on the case, and was one which could have been avoided had the president of the court consulted the provisions of G. O. 70, W. D., 1914.

PLEA OF GUILTY: Does not preclude taking of evidence to determine degree of punishment.

An officer was convicted, in accordance with his plea, of having unfitted himself, by the use of intoxicating liquors, for an important duty, for which he had been detailed under orders of the War Department, necessitating his admission to a post hospital. He was sentenced to be reprimanded. According to the testimony of the accused he drank intoxicating liquor for several days on account of a cold and slight cough; he did not insist that this was upon the advice of a physician; nor does it appear that he even sought the advice or services of a physician during this time, though three medical officers of the Army were available and the accused was living in the same building with one of them. These medical officers attended the accused after his admission to the hospital.

The accused was the only witness heard upon the trial. No reason appears of record as to why the evidence of these medical officers was not had before the court; for a full understanding of the case their evidence was necessary; and the judge advocate and the court failed to do their full duty in trying the case upon the admissions and testimony of the accused alone.

Even upon the showing made by the accused, punishment much more severe than reprimand should have been imposed.

RECORD: Needless errors in, evidencing lack of care.

In a case recently tried in the Central Department, the court found accused guilty of absence without leave, under a charge of desertion, and then imposed a sentence involving a period of confinement twice

as long as that authorized for the absence without leave, and more appropriate for desertion. On return of the record for revision, the finding was properly corrected to one of guilty of desertion. This case is one of a considerable number, revealed by examination of records in this office during the past month, in which delay of disposition of cases has occurred because of irregularities which required the return of records for revision. In practically every case the irregularities and consequent delay could have been avoided by the exercise of reasonable care on the part of members of the court, or the judge advocate, in applying the plain provisions of the Manual for Courts-Martial during the proceedings, or by carefully scrutinizing the record before forwarding it to the reviewing authority.

RECORD: Needless errors in, necessitating reconvening court.

In a case recently tried in the Philippine Department the accused under a charge of desertion made the usual and prescribed exceptions and substitutions in the specification so that it would allege absence without leave only and pleaded under the charge not guilty of desertion but guilty of absence without leave, in violation of the 32d Article of War. The court, which was composed of officers of experience, in supporting the plea of the accused, instead of following the form prescribed, found him of specification and charge "guilty as plead." In preparing its record the court recorded as present at assembling for trial the name of an officer who had been detailed as judge advocate but relieved prior to the meeting of the court, inserted a mimeograph copy of the orders convening the court and modifying the detail, instead of copying them, and omitted the company and regiment of the accused from the sentence, all of which caused unnecessary delay and made it necessary for the convening authority to order the court to be reconvened for correction of its record.

RECORD OF TRIAL: Incomplete, should be returned by reviewing authority for correction.

In a case recently tried in the Southern Department, the reviewing authority remarked that a plea to one of the specifications was omitted from the record but that from evidence in the case it might properly be assumed that a plea of not guilty was entered. The court which tried the case could have been reconvened to make its record show whether or not there was in fact a plea entered to the specification in question. It happens that the punishment in this case was a light one for any one of the three specifications of which the accused was convicted, but it is obvious that embarrassment in the administration of military justice might arise from failure to make a record conform to the facts in a trial.

SENTENCE, INADEQUATE: Officer convicted of mistreatment of enlisted men.

An organization commander was recently convicted by general court-martial of mistreatment of enlisted men of his command, the mistreatment including (1) the use of profane language toward cer-

tain of them, and (2) the inflicting of humiliating correction upon one of them by causing his mouth to be washed with soap and water, facing him toward a wall and requiring him to assume certain constrained positions.

These punishments transcend any disciplinary authority vested in organization commanders recognized by paragraph 953, A. R. They have not that element of excuse which would be present if the organization commander had been dealing with mutiny or mutinous conduct which is not suggested by the record. They exhibit the organization commander as himself lacking that self control without which capacity to control others may not be expected. The case was one calling for much severer punishment than the reprimand imposed. The reviewing authority's action in carrying out the reprimand was limited in substance to an expression of the belief that the anxiety caused the organization commander by the investigation and trial, together with the admonition conveyed by the issuance of the order, constituted a sufficient reprimand, and shows failure on his part to appreciate the gravity of the offense. The terms in which the reprimand was administered are in effect an excuse for not carrying out the sentence imposed.

SENTENCE OF DISHONORABLE DISCHARGE: Suspension of, when proper.

The annual reports of the judge advocate of departments and other commands having general court-martial jurisdiction for the fiscal year 1915 reveal that in the whole Army there were 410 cases, in which sentence of dishonorable discharge was suspended by the reviewing authority, and that 280 of these cases were so acted upon by the commander of one department. This number is 39.77 per cent of all the sentences of dishonorable discharge imposed by courts of that command during the year. It is believed that a careful consideration of the records of trial will not justify suspension of sentence in so high a percentage of cases.

Paragraph 7, G. O. No. 70, W. D., 1914, provides that a sentence of dishonorable discharge will be suspended only "whenever the character of the offense for which the sentence is imposed and the facts developed by the evidence indicate that there is a probability of reclaiming the soldier to honorable service." On the other hand, while the particular department commander probably used the power of suspension too freely, the fact that the suspensions in this department were 68.3 per cent of the whole number of suspensions would seem to indicate that other department commanders have not availed themselves of the authority in proper cases.

BULLETIN 39.

BULLETIN }
No. 39. }

WAR DEPARTMENT,
WASHINGTON, *December 7, 1915.*

The following digest of opinions of the Judge Advocate General of the Army, for the month of November, 1915, together with a collection of notes on military justice prepared under the direction of the Judge Advocate General of the Army, is published for the information of the service in general.

[2255370 J—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Major General, Chief of Staff.

OFFICIAL:

H. P. MCCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

CIVILIAN EMPLOYEES: Leaves of absence to attend military camps of instruction.

The question was presented whether Government employees desiring to attend business men's camps of military instruction might be permitted to do so on a pay status without having the time so spent charged against their regular annual leaves. It was pointed out that Government employees belonging to the Organized Militia of the District of Columbia enjoy such a privilege while on duty with the Militia. By section 49 of the District of Columbia militia act of 1889 (25 Stat., 779), it was provided that officers and employees of the United States and of the District of Columbia who are members of the National Guard shall be entitled to leave of absence from their respective duties, without loss of pay or time, "on all days of any parade or encampment ordered or authorized under the provisions of this act."

Held, that the provisions of the act of 1889 referred to apply only to Government employees belonging to the National Guard of the District of Columbia, and that, there being no similar statutory provision in respect to other employees, any absence from duty for the purpose referred to would have to be charged against their annual leave or without pay if the annual leave be exhausted.

(58-400, J. A. G., Nov. 20, 1915.)

DESERTERS: Restoration to duty as affecting forfeiture of deposits.

In the case of a deserter sentenced to dishonorable discharge and to a term of imprisonment and who received an honorable restoration to duty under section 1352, Revised Statutes, the question was

presented whether deposits which he had made with a quartermaster prior to his desertion were restored to him. (See Bul. No. 8, W. D., 1914, page 10.) By the act of June 12, 1906 (34 Stat., 246), it was provided that soldiers' deposits "shall be forfeited for desertion."

Held, that a restoration to duty in such cases does not affect the forfeitures.

(80-462, J. A. G., Nov. 2, 1915.)

DETACHED SERVICE LAW: As to credit for service with machine-gun troop of Cavalry.

A second lieutenant who had performed duty with a machine-gun troop of Cavalry applied to have such service credited as service with troops within the meaning of the detached-service law. It was pointed out that the old machine-gun platoon of a regiment of cavalry has been superseded by a machine-gun troop, so that the language of the general law (act of August 24, 1912, 37 Stat., 645)—"duty * * * with a troop, battery, or company"—would appear to be applicable.

Held, that the expression "troop, battery, or company" was intended to apply only to organizations so designated by statute, and not to any group which might from time to time be termed a troop or company by the War Department; that the regimental machine-gun troop or company is an organization unknown to the law and therefore not included in the class defined by Congress when the original detached-service law was enacted.

(6-124.5, J. A. G., Nov. 10, 1915.)

ENLISTED MEN: Purchase of discharge.

Discharge by purchase was authorized by the Act of June 16, 1890 (26 Stat., 158), which provides that—

"In time of peace the President may, in his discretion and under such rules and upon such conditions as he shall prescribe, permit any enlisted man to purchase his discharge from the Army."

The rules prescribed are contained in General Orders No. 31, War Department, 1914, and extend the privilege of purchase to "any enlisted man who has completed one year's service as such," with the restriction that "credit will not be given * * * for any period of time during which a soldier has been in desertion or absent without leave."

Held, that the term "one year's service" as used in the above mentioned Order No. 31 is to be construed as including all time not excluded by the restriction that "credit will not be given * * * for any period of time during which a soldier has been in desertion or absent without leave."

(34-052, J. A. G., Nov. 17, 1915.)

PRIVATE MOUNTS: Shipment of, at public expense.

An officer who had resigned from the Army requested the shipment of his private mount at public expense as an incident to his change of station made before his resignation. The shipment of private mounts

is governed by paragraph 1098, Army Regulations, and among the conditions is the restriction that the horses must be owned by the officer and "are intended to be used by him at his new station in the public service."

Held, that the effect of the regulation is that the right of shipment of private mounts at public expense is not a personal one which becomes vested in the officer as a necessary incident of a change of station, but on the contrary is conditioned upon the officer's intended use of the horses in the public service, and this intention must exist when the shipment is made.

(64-330, J. A. G., Nov. 9, 1915.)

NOTES ON ADMINISTRATION OF MILITARY JUSTICE.

(Prepared under the direction of the Judge Advocate General of the Army upon the review of records of general courts-martial trials.)

DELAY: Due to carelessness of court or of judge advocate.

Delays in final action by the reviewing authority because of carelessness on the part of the court or of the judge advocate are frequently found. In one recent case the record failed to account for one member of the court, while another was reported as both present and absent; thirteen days were lost through the necessity of returning the record for correction. In a sentence which was intended to impose dishonorable discharge, forfeiture, and confinement, the court omitted the words "discharged" and "pay and." Before the record was received back for correction, changes of station had reduced the court below the number required by law, and it was necessary to order one of the members back from a distant station to make up the required number. The time thus lost was one month and twenty-five days. In one case the court omitted to record a finding under one of the specifications, and final action was thereby delayed thirty days. Failure to follow the prescribed form for sentences caused delays of seven days in each of two recent cases, and of six days in another.

DEPOSITIONS: Necessity of covering all essential facts by interrogatories.

In a case of desertion recently tried, it was charged that the accused was *apprehended* at a certain place on a certain date, but the judge advocate, in preparing interrogatories for depositions, failed to include any questions concerning these allegations. The accused pleaded not guilty, thus casting the burden of proof of every allegation of the specification upon the prosecution. The court found the accused guilty as charged. On return of the record by the reviewing authority calling attention to the lack of evidence as to the facts in question, the court made amendments resulting in a finding that the accused remained absent in desertion "until some date after August 1, 1914." The reviewing authority accepted this unusual finding for the purpose of the sentence, assumed, as being most favorable to the accused, that he surrendered, approved the sentence and reduced the

period of confinement imposed. This delay thus caused in final action on the case was sixteen days.

In two cases of desertion, where the evidence as to the absence was obtainable only by deposition, the judge advocate asked the question whether the accused absented himself on such a day, but made no inquiry as to whether the absence was without leave. It so happened that the accused in each of these cases pleaded guilty to the unauthorized absence; otherwise, serious delay, and possibly a miscarriage of justice, would have resulted.

FINDINGS: Making such amendments that specification fails to state an offense.

In a case recently tried in the Southern Department, the record was returned by the reviewing authority because under a specification alleging theft the court found the accused not guilty of the theft but guilty of having "guilty knowledge" of the same. The reviewing authority expressed the view that under the finding of the court the specification did not state a military offense. The court then amended its finding to show that the accused having knowledge of the theft failed to make a report thereof. The delay in the final disposition of the case on account of the erroneous finding of the court was about twelve days.

Under a specification that the accused did feloniously take, steal, and carry away a certain article, the court found the accused guilty except of the words "feloniously" and "steal," and of the excepted words not guilty. The specification as amended does not state an offense. It was therefore necessary for the reviewing authority to return the record for revision, and the court then properly substituted the word "unlawfully" for "feloniously."

RECORD: Unnecessary return of.

In a case recently examined, the record shows that the reviewing authority returned it for the reason that when the accused changed his plea to a specification from not guilty to guilty the court allowed the plea of not guilty to the charge to remain of record. The time lost before final action of the reviewing authority was about seven days. While there is no disposition to criticise in matters within the discretion of reviewing authorities, it is suggested that where a defect in pleading is cured by the finding, as it was in this case, the return of the record is unnecessary and serves only to prolong the period between the arrest of the accused upon charges and his entering upon the execution of his sentence.

SPECIFICATIONS: Necessity for precision in drawing of.

In a case recently tried in the Central Department, the accused pleaded guilty to two specifications, each alleging that he committed "an act of sexual perversion" without any words descriptive of the act. There was no evidence taken in the trial. The court imposed a sentence of dishonorable discharge, total forfeiture, and confinement at hard labor for two years. The reviewing authority designated a

penitentiary as the place of confinement, but as there was nothing in the record of trial to indicate that the accused had committed an offense punishable by penitentiary confinement under the law of the State or of the United States, it became necessary to change the designation to the United States Disciplinary Barracks, Fort Leavenworth, Kans. This case is noted as showing that in all cases of sexual perversion the precise acts constituting the offense should, if possible, be ascertained and set forth in the specifications in order that it may be definitely ascertained if the offense be one punishable by confinement in a penitentiary.

SENTENCE: Failure to follow forms prescribed in G. O. 70, W. D., 1914.

In a case recently tried in the Philippine Department, the record was returned by the reviewing authority because the court in awarding a sentence, involving confinement at hard labor and forfeiture, instead of following the form prescribed for such sentence in G. O. No. 70, W. D., 1914, sentenced the accused "to be confined at hard labor at such place as the reviewing authority may direct for forty-eight days and to forfeit thirty-two days of his pay." There seems to be no reasonable excuse for the failure of a court composed of experienced officers, as this one was, to comply with the plain provisions of the order in question.

SENTENCE: Failure to include hard labor in connection with extended periods of confinement.

In three cases recently examined in this office, the sentences, which involved long periods of confinement, did not include hard labor. Because of these defective sentences, it was necessary for the reviewing authority to return the record for revision, resulting in delays of five, seven, and eight days, respectively, in the final disposition of these cases.

SENTENCE: Relation to finding and evidence.

In a case tried in the Eastern Department, the accused, a retired soldier, pleaded guilty to a minor offense, which, as explained to him by the president of the court, justified a sentence to forfeit \$15. He was convicted of this offense and also of the larceny of \$75, and was sentenced to be dishonorably discharged, forfeiting all pay and allowances. Eight days thereafter, before the record had been forwarded to the reviewing authority, the court revoked its former sentence and sentenced the accused to confinement at hard labor for 18 months and forfeiture of two-thirds of his pay for the same period. The reviewing authority returned the record "for reconsideration and such consequent revision, if any, of findings or sentence, or both, as may be deemed appropriate," with the following further remarks:

"The attention of the court is invited to the fact that the result of approval of the sentence finally imposed in this case would be to retain on the retired list, as a recipient of retired pay, a convicted thief. If the court was moved to the adoption of the sentence imposed in this case by a reasonable doubt of the guilt of the accused of the second specification, such doubt should have caused a finding of not guilty thereon. If, however, the accused is guilty as charged, it

would seem that there can be no doubt whatever as to the impropriety of retaining him on the rolls as a pensioner of the Government."

The court thereupon revoked its former findings, and acquitted the accused of larceny, but sentenced him to confinement at hard labor for six months and forfeiture of two-thirds of his pay for a like period.

The court was well within its authority in reassembling, upon its own motion, to correct any error of judgment as to finding or sentence so long as the case was before it. But the procedure actually followed in this case indicates vacillation not creditable to the administration of justice. First we have a conviction of grand larceny and a sentence of dishonorable discharge and forfeiture but without confinement at hard labor, which is usually and properly imposed where the offense of which the accused is convicted is of such gravity; second, the revocation of this sentence and the substitution therefor of a sentence of confinement at hard labor for a prolonged period (18 months), with forfeiture of two-thirds of his pay for the same period, but without dishonorable discharge, the effect of which, if approved, would have been to leave a convicted felon on the rolls of the Army; third, the revocation of this latter sentence and of the finding upon which it was based, and the substitution therefor of a finding of not guilty of larceny and guilty of a minor offense punishable by forfeiture of \$15, for which, however, the excessive sentence of six months' confinement at hard labor and forfeiture of two-thirds of his pay for the same period was imposed. This final action of the court has the appearance of a compromise between a finding of guilty and one of not guilty on the graver offense, and the procedure, taken as a whole, indicates that the court felt that a retired enlisted man convicted of felony was to be treated with greater leniency than an enlisted man on the active list convicted of a similar offense. It was the clear duty of the court, having acquitted the accused of grand larceny, to proceed to the imposition of a sentence as though that offense had never been charged, and any belief on the part of the court that he was guilty thereof, should not have influenced the amount of punishment to be adjudged. A sentence based on evidence which the court deems insufficient to convict is illogical and palpably inconsistent with elementary principles of justice, and, of course, no distinction as to punishment based on conviction of felony should be made between active and retired enlisted men.

WITNESSES: Testimony of wife against husband as witness in cases of personal abuse.

In the case of an officer recently tried, the accused was charged, *inter alia*, of committing a number of acts of personal abuse of his wife. When the prosecution offered her testimony, there was objection on the part of the defense on the ground of her incompetency as a witness. The trial judge advocate ably presented to the court the present state of the law, which regards a wife as a competent witness against her husband in cases of personal abuse, but the court excluded her as such except for the purpose of testifying to one specification. The reviewing authority pointed out the error of the court in excluding the wife as a witness as to the other acts charged.

BULLETIN 1.

(Bulletin No. 41 is the last of the series for 1915.)

BULLETIN }
No. 1. }

WAR DEPARTMENT,
WASHINGTON, *January 11, 1916.*

The following digest of opinions of the Judge Advocate General of the Army, for the month of December, 1915, and of certain decisions of the Comptroller of the Treasury and of courts, together with a collection of notes on military justice prepared under the direction of the Judge Advocate General of the Army, is published for the information of the service in general.

[2255370 K—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Major General, Chief of Staff.

OFFICIAL:

H. P. MCCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

A CORRECTION.

On page 8 of Bulletin No. 43, War Department, 1914, in the case reported under the heading "Reenlistment: After four years' service and passing to the reserve," insert the word "not" in the third paragraph, first line, between the words "had" and "been." The language should be, "*Held*, that a soldier who had *not* been reenlisted," etc.

ENLISTED MEN: As to making up lost time; Army Reserve.

In the case of enlisted men to be furloughed to the Army Reserve who have lost time from service by reason of absence without leave (Act of May 11, 1908, 35 Stat., 109), or by reason of the use of intemperate drugs, alcoholic liquors, etc., or confinement awaiting trial resulting in conviction (Act of April 27, 1914, 37 Stat., 590), the question was presented whether they were required to make up the time so lost before being furloughed to the Army Reserve, or after.

Held, that it was clearly the purpose of the acts mentioned to obtain from enlisted men the measure of *service* contemplated by their enlistment contracts; that the Army Reserve Act providing for seven-year enlistments requires a specified number of years' *service* and that a soldier is not eligible for furlough to the Army Reserve until he has completed the full *service* period of three or four years, as the case may be, including any time lost within the meaning of the above-mentioned acts.

(34-052, J. A. G., Dec. 13, 1915.)

HEAT AND LIGHT: Allowances to families of officers on temporary duty.

In the case of officers transferred from one command to another while on temporary duty on the Mexican border, it was suggested that such a change "in most every case makes a change of permanent station" resulting in "placing many officers' families in such a position that they cannot draw the officers' heat and light allowance" under existing regulations, which provide that an officer's family is entitled to draw his heat and light allowance only at his permanent or temporary station.

Held, that the transfer of an officer from one command to another in the temporary service on the Mexican border should not be regarded as *ipso facto* a change of permanent station, and that for the purposes of fuel and light allowances for the officer's family at his permanent station their status should not be disturbed until there has been an *actual* change of permanent station by the officer.

(72-315, J. A. G., Dec. 21, 1915.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

GRATUITY: As to additional pay for mounts of officer killed in aviation accident.

It is provided by the Act of July 18, 1914 (38 Stat., 516), that in the case of an officer or enlisted man killed in an aviation accident not the result of his own misconduct, there shall be paid to his widow or other designated beneficiary "an amount equal to one year's pay at the rate to which such officer or enlisted man was entitled at the time of the accident resulting in his death."

Held, that the gratuity authorized by this act includes pay for mounts where the officer was entitled to additional pay for mounts at the time of the accident resulting in his death. (14 Comp. Dec., 851.) *Held further*, that this ruling does not affect other decisions holding that additional pay for mounts is not pay proper within the laws granting additional pay for foreign service.

(Comp. W. W. Warwick, Dec. 4, 1915.)

PAY AND ALLOWANCES: As to pay of officer for mounts while on leave of absence with half pay.

The question was presented whether an officer of the Army was entitled to pay for mounts for time he was on leave of absence with half pay. In the case under consideration the officer was duly mounted, and he retained his horses at his post during a leave of absence of three months, two months of which was with full pay and one month with half pay as provided by section 1265, Revised Statutes, and the Act of July 29, 1876 (19 Stat., 102). Paragraph 1274, Army Regulations, provides that officers do not forfeit the right to additional pay for mounts by reason of *ordinary* leave. Pay for mounts is regarded as in the nature of an allowance and not as pay proper (21 Comp. Dec., 848), and, following the rule as to commutation of quarters (A. R. 1301).

Held, that the officer was not entitled to pay for mounts for the time he was in a half pay status; that the half pay status is not such a status as requires or justifies a liberal construction of statutes relating to pay and commutation, and that if an officer chooses to extend his ordinary leave and put himself in a half pay status, he can not reasonably expect his allowances, or pay in the nature of an allowance, to continue.

(Comp. W. W. Warwick, Dec. 4, 1915.)

DECISIONS OF COURTS.

(Digests prepared in the office of the Judge Advocate General.)

CONTRACTS: Provisions of section 3744, Revised Statutes, construed.

In a suit by the Government against the New York and Porto Rico Steamship Company to recover the excess cost of procuring transportation of coal for the Navy Department, over that at which the defendant had agreed through correspondence to transport it, the ground of defense was that the informal agreement not having been embodied in a formal contract in accordance with section 3744, Revised Statutes, was void and unenforceable. By this section it is made the duty of the Secretaries of War, the Navy, and the Interior to cause every contract made by their authority on behalf of the Government "to be reduced to writing, and signed by the contracting parties with their names at the end thereof"; all the copies and papers in relation to the same to be attached together by a ribbon and seal, etc.

Held, that this statute is for the protection of the Government against possible frauds upon it by its officers; that no such protection is needed by a private person against a written undertaking signed by himself, and that while it is established that a contract not complying with the statute cannot be enforced against the Government, such a contract may be enforced against the other party. "Even when a statute in so many words declares a transaction void for want of certain forms, the party for whose protection the requirement is made often may waive it, void being held to mean only voidable at the party's choice."

(*United States v. New York and Porto Rico Steamship Company*, decided by the Supreme Court of the United States, Nov. 15, 1915.)

TAXATION: Power of State to imprison soldier for nonpayment of poll tax.

A noncommissioned officer stationed at Fort Stark, N. H., whose parental domicile was New York, married a New Hampshire woman. He maintained an apartment in the city of Portsmouth, N. H., for his wife where he spent three or four nights a week under military authorization. The city of Portsmouth assessed a poll tax against the soldier upon the theory that he had acquired a domicile in the city, and upon his refusal to pay it, he was arrested and committed to jail. In discharging the prisoner from the custody of the State authorities, upon a writ of habeas corpus, the Federal District Court

for New Hampshire recognized the force of the Government's contention, supported in principle by numerous authorities, to the effect that it is an essential and necessary power of the Federal Government, in the maintenance of its military establishment, to protect its soldiers from arrest and imprisonment for poll tax or from other restraints and burdens affecting personal liberty imposed by municipal government through its taxing powers, and that the question of domicile or inhabitancy is immaterial.

The court, however, did not choose to make its decision so sweeping, but considered it sufficient to hold that while a soldier may be so far *sui juris* that he may for certain purposes establish a domicile or residence away from his military station, provided it does not interfere with his military service, the circumstances must clearly indicate such an intention and that in the instant case the circumstances negated such an intention, so that the soldier was not an inhabitant of the State, that is, was not domiciled in the State within the purview of the local tax law. The court said in part:

"It is clear that there was no definite purpose to make the Portsmouth residence, such as it was, a permanent residence. The petitioner had a parental domicile in New York, and to establish a change for any purpose the intention must be clear. Here the military situation was altogether inconsistent with the element of any supposed permanency in the City of Portsmouth and away from the station of duty. Under such circumstances, the domicile of the husband would not follow that of the wife under an arbitrary rule; and maintaining the apartment in Portsmouth that his wife might live there, and that he might visit her under leave when the circumstances should permit, must be accepted as a mere incident of his military status, and one entirely subordinate to his duty to the Government when viewed in respect to personal taxation and the restraints of personal liberty, involved in the enforcement of a personal tax, which necessarily would interfere with the free performance of a paramount duty. The petitioner should be discharged from custody under city and State authority, and it is so ordered."

(*John P. White, petitioner, v. City of Portsmouth (N. H.)*, decided Nov. 30, 1915.)

NOTES ON ADMINISTRATION OF MILITARY JUSTICE.

(Prepared under the direction of the Judge Advocate General of the Army upon the review of records of general courts-martial trials.)

CLEMENCY: Recommendations to.

The review in the Office of the Judge Advocate General of the records of trial by general courts-martial, and especially in the cases of enlisted men, leads to the belief that possibly the provision in paragraph 12 of General Orders No. 70, War Department, 1914, in reference to recommendations to clemency, is sometimes lost sight of. Members of courts-martial should never hesitate to submit such recommendations in the manner therein indicated whenever they believe the facts and circumstances in any case justify clemency.

PLEA OF GUILTY: Duty of president of court-martial respecting.

The records of the recent trials by general courts-martial disclose that in many cases the requirements of paragraph 8, General Orders No. 70, War Department, 1914, were not observed. In 154 cases consecutively reviewed 23 of the records showed the presidents of the courts to have failed in this respect. That paragraph requires, among other things, that in each case where the accused enters a plea of guilty the president of the court shall explain to him, first, the meaning of such plea, and second, the extent of the punishment to which the plea will subject him. Every commander exercising general court-martial jurisdiction is expected to exact a full compliance with these requirements; and in every case where the record shows a failure by the president of the court in this regard the reviewing authority should, without delaying action on the sentence therefor, require a written explanation by such president to accompany the record when it is forwarded to the Judge Advocate General.

BULLETIN 8.

BULLETIN }
No. 8. }

WAR DEPARTMENT,
WASHINGTON, *March 8, 1916.*

The following digest of opinions of the Judge Advocate General of the Army, for the months of January and February, 1916, and of certain decisions of the Comptroller of the Treasury and of courts, is published for the information of the service in general.

[2375247, A. G. O.]

H. L. SCOTT,
Secretary of War, ad interim.

OFFICIAL:

H. P. McCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ARMY RESERVE: Enlistment of members of, in Organized Militia and employment as stablemen.

The question was presented whether enlisted men in the Army Reserve are eligible for enlistment in the Organized Militia and employment as stablemen for militia batteries. The law requires that such employees shall be enlisted men of the Organized Militia. (38 Stat., 1071.)

Held, that members of the Army Reserve are not eligible for such employment, since the conditions under which the Army Reserve and the Organized Militia will be called into active service will usually co-exist, so that the necessity of the soldier to rejoin his regiment for action would result in leaving a vacancy in the militia where competent and experienced men are required.

(58-051, J. A. G., Jan. 15, 1916.)

ARMY RESERVE: Medical treatment of members.

Paragraph 1453, Army Regulations, provides that recently discharged soldiers, needing hospital treatment, who arrive in New York City, San Francisco, or other port on Government transports, may be sent to one of the military hospitals in the vicinity and rations in kind drawn for them while undergoing treatment.

Held, that the same rights under similar conditions may and should be accorded to enlisted men recently furloughed to the Army Reserve.

(6-227.6, J. A. G., Feb. 26, 1916.)

CIVILIAN EMPLOYEES: Ration allowance while under treatment in hospital.

A civilian employed as teamster in the Quartermaster Corps at Honolulu, H. T., at \$40 a month *and rations*, having been injured while in the performance of his duty, was duly admitted to the post

hospital for treatment. No provision is made by law for the payment of commutation of rations to civilian employees, and it is expressly prohibited by A. R. 1229.

Held, that as the employee was entitled to rations under his contract of employment in accordance with A. R. 1203, the hospital should draw his rations in kind and remit the charge of 40 cents a day prescribed by A. R. 1460.

(5-242, J. A. G., Feb. 26, 1916.)

CLAIMS: As to compromise of Government claims.

A garbage crematory was protected by the contractor for one year under an indemnity bond against defects in material and workmanship. Within the year the Government made repairs at an expense of \$100. There was a disagreement whether the whole amount was chargeable against the contractor and it was proposed to *compromise* the claim by the payment to the United States of \$45, which proposition was reported by the local constructing quartermaster as a "fair offer."

Held, that if the contractor's liability was \$100, the War Department would have no authority to compromise by accepting a smaller sum, since claims in favor of the Government, other than those arising under the postal laws, can only be compromised by the Secretary of the Treasury under authority of Section 3469, Revised Statutes. (21 Opins. Atty. Gen., 494; 23 *Id.*, 631).

Held further, that if upon further consideration it be ascertained that the cost of the repairs properly chargeable to the contractor was \$45, and not \$100, it should be so reported and the case settled on the true basis.

(76-742, J. A. G., Feb. 10, 1916.)

COURTS-MARTIAL: Effect of sentence of dishonorable discharge upon prior unserved enlistment.

A deserter from the Army enlisted in the Marine Corps. His organization therein was detached for service with the Army, and during such service he was tried by Army court-martial and "dishonorably discharged the service of the United States."

Held, that the sentence to be "dishonorably discharged the service of the United States" was a complete expulsion of the enlisted man from the service of the United States and operated to terminate his unserved enlistment with the Army, although the court-martial knew nothing of his desertion.

(28-130, J. A. G., Jan. 13, 1916.)

EIGHT-HOUR LAW: Not applicable to chauffeurs.

Held, that a chauffeur is not within the purview of the eight-hour law which applies to laborers and mechanics.

(32-223, J. A. G., Jan. 22, 1916.)

ENLISTED MEN: Commutation of rations.

Request was made for authority to pay commutation of rations to three certain enlisted men at a garrisoned post, on the ground that the hours during which they were required to work made it impracticable for them to be subsisted with any organization.

Held, that the provisions of the Army Appropriation Act for the payment of commutation of rations to enlisted men "when stationed at places where rations in kind can not be economically issued" is tantamount to a prohibition against the payment of such commutation to enlisted men serving at a garrisoned post, and that the proposed payment would be contrary to the statute and forbidden by paragraph 1229, Army Regulations.

(6-228, J. A. G., Jan. 8, 1916.)

ENLISTED MEN: Reenlistment after four years' service.

The question was presented whether an enlisted man after having served four of the seven years of his enlistment and is discharged for the purpose of reenlistment is required to reenlist immediately, or whether he "has the privilege of remaining out the authorized three months before reenlistment."

Held, that the provision for the discharge of an enlisted man at the end of four years under the Army Reserve Act (37 Stat., 590) does not contemplate that he shall thereby become a civilian, but is for the purpose of substituting a new enlistment contract for the old, without interruption of the service status of the soldier, and that, therefore, a discharge at the end of four years' service under the Army Reserve Act can be given only upon reenlistment.

(6-300, J. A. G., Jan. 5, 1916.)

FOREIGN SERVICE: Construction of statute relating to tours of duty.

The Act of March 4, 1915 (38 Stat., 1078), provides that no officer or enlisted man of the Army shall, *except upon his own request*, be required to serve in a single tour of duty for more than two years in the Philippine Islands, nor more than three years in the Panama Canal Zone, except in case of insurrection or actual or threatened hostilities.

Held, that if a tour of duty is extended at the request of an officer or enlisted man, he may be required to serve the full period extended.

(6-160, J. A. G., Jan. 28, 1916.)

MEDICAL ATTENDANCE: Officer on leave of absence.

An officer while on leave of absence suddenly became ill at an army post and requested that he be taken up on "sick report." The physician employed by the Government to furnish medical attendance for the post had left the post for the day and could not be located. Another physician was called in and upon his recommendation the officer was sent to the city hospital, where he remained under the care of the latter physician until he was able to leave the hospital, after nine

days, when he returned to the post and received treatment by the post physician. Accounts were submitted for the payment by the Government of the hospital and physician's bills. By a provision contained in the appropriation item for the medical care and treatment of officers and enlisted men by civilian physicians or in private hospitals it is declared that "this shall not apply to officers and enlisted men who are treated in private hospitals or by civilian physicians *while on furlough.*"

Held, that the accounts were not payable from public funds, not only because the officer was in a leave status, but also because it was not shown that the necessary treatment could not have been had under the facilities of the post, except, possibly, the first or emergency treatment.

(6-227.6, J. A. G., Feb. 19, 1916.)

PAY AND ALLOWANCES: Continuous service pay of enlisted men.

The question was presented whether a soldier serving an enlistment entered into on or after November 1, 1912 (the date the 7-year enlistment law took effect), must serve over 2 years or over 3½ years prior to a discharge for the convenience of the Government in order to entitle him, upon reenlistment, to be placed in a higher enlistment period with reference to continuous service pay. The Act of May 11, 1908 (35 Stat., 109), relating to continuous service pay, provides that "any soldier who receives an honorable discharge for the convenience of the Government after having served more than half of his enlistment shall be considered as having served an enlistment period within the meaning of this act," and the Act of August 24, 1912 (37 Stat., 590), establishing the Army Reserve contains the provision that "for all enlistments hereafter accomplished under the provisions of this act, four years shall be counted as an enlistment period in computing continuous-service pay."

Held, that the above mentioned provisions of the acts of 1908 and 1912 are *in pari materia*, the purpose being to regulate continuous service pay, and that as the act of 1912 declares that four years shall constitute an enlistment period in computing continuous service pay, the act of 1908 operates with reference to the said four-year period, and hence a soldier enlisted under the act of 1912 who receives an honorable discharge for the convenience of the Government after having served more than two years is entitled to be credited with an enlistment period for such service.

(28-231, J. A. G., Feb. 26, 1916.)

PENALTY ENVELOPES: Use of, in connection with the expenditure of company fund.

A company commander used penalty envelopes in conducting correspondence for the purchase from the company fund of beer for a special dinner of the company mess. The post-office authorities questioned whether such use of the penalty envelope was authorized as relating "exclusively to the business of the Government of the United States." (19 Stat., 319.) A company commander is required

to disburse the company fund solely for the benefit of the company. (A. R., 327.)

Held, that Congress, having prohibited the sale of or dealing in intoxicating liquors upon any premises used for military purposes, the presumption is that the statute proceeded upon the theory that the use of intoxicating liquors as a beverage is detrimental and not beneficial to persons in the military service; that upon this theory an expenditure of the company fund for such purpose would not be "solely for the benefit of the company" as directed by A. R. 327, and therefore unauthorized, and the use of the penalty envelope consequently was not for the business of the Government and was unauthorized.

Held further, that as to purchases from the company fund of articles properly to be regarded as "solely for the benefit of the company," the use of penalty envelopes therefor would be authorized as relating to the business of the Government, the company fund being a Government agency.

(22-020, J. A. G., Jan. 28, 1916.)

PUBLIC RECORDS: Procedure for the disposition of useless files and papers.

The Act of February 16, 1889 (25 Stat., 672), provides that—

"Whenever there shall be in any one of the Executive Departments of the Government an accumulation of files of papers, which are not needed or useful in the transaction of the current business of such Department and have no permanent value or historical interest, it shall be the duty of the head of such Department to submit to Congress a report of that fact, accompanied by a concise statement of the condition and character of such papers."

The act further provides that upon being duly authorized, as set forth therein, it shall be the duty of the head of the department to sell or otherwise dispose of the papers upon the best obtainable terms, depositing the proceeds in the Treasury. The said act of 1889 was amended so as to include in its provisions "any accumulation of files of papers of a like character therein described now or hereafter in the various public buildings under the control of the several Executive Departments of the Government." (28 Stat., 933.)

Held, that the Act of 1889 as amended prescribes the procedure for the disposition of all useless files of papers under the jurisdiction of the several departments, whether at the seat of Government or elsewhere, and that it operates to prohibit the destruction of records save as therein prescribed.

(66-322, J. A. G., Jan. 7, 1916.)

REIMBURSEMENTS: Expenditure of private funds for use of Government.

A chaplain of an organization which was about to go into camp requested authority to incur expenses for motion pictures and other means of diversion at the recreation tent. Before receiving a response from the department commander, which disapproved the pro-

posed expenditure, the chaplain went ahead and put a motion picture machine in operation and paid the cost from his own private funds. Upon his application to the War Department to be reimbursed, it was *held* that reimbursement could not be authorized in view of the ruling of the Comptroller of the Treasury that "the expenditure of private funds for supplies for the use of the Government is not authorized except under stress of urgent and unforeseen public necessity." (16 Comp., 519.)

(40-100, J. A. G., Jan. 10, 1916.)

STATE COURTS: Arrest of enlisted man in civil proceeding for debt.

Section 1237, Revised Statutes, provides:

"No enlisted man shall, during his term of service, be arrested on mesne process, or taken or charged in execution for any debt, unless it was contracted before his enlistment, and amounted to twenty dollars when first contracted."

A writ for the arrest of an enlisted man was issued by State authorities in a civil proceeding for debt under the laws of the State relating to absconding debtors, the enlisted man sought being about to leave the jurisdiction under military orders.

Held, that the writ of arrest, not being in a criminal action but being an auxiliary process in a civil proceeding, and therefore *mesne* process, and the debt having been contracted *after* the soldier's enlistment, the arrest would be illegal in view of section 1237, Revised Statutes, *supra*.

Held further, that in case of a criminal prosecution and the issuance of a warrant of arrest of an enlisted man by State authorities, it would be the duty of the commanding officer, under the 59th Article of War, to interpose no obstacle to the arrest, but on the other hand to assist the civil authorities in executing the writ.

(14-233, J. A. G., Feb. 25, 1916.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

CLAIMS: Reimbursement for expenses.

Two vouchers were submitted for decision as to their legality. The first was for \$15.01 in favor of the widow of a deceased officer "for hauling his personal effects from railroad station at Plainfield, N. J., to storage, per receipted bill." The second voucher was for \$3.25 for "reimbursement of expense incurred by payee, a clerk in the Medical Corps, U. S. Army, for cartage of his household goods, weighing 2343 lbs., from freight station to residence at Lyndhurst, N. J., upon change of station pursuant to orders."

Held, that there is no law, or regulation having the force of law, which makes provision for the reimbursement of a person, as in the two cases submitted, who hauls his baggage upon his own responsibility at his own expense; that if the hauling in question in both cases be a proper charge against the United States, it was an expense

which should have been incurred by the Quartermaster Corps of the Army and not by the persons whose property it was; and that the hauling being voluntary on the part of the persons concerned, reimbursement of the cost is not authorized.

(Comp. W. W. Warwick, Feb. 26, 1916.)

CONTRACTS: Delivery of supplies after expiration of contract period.

By contract dated April 26, 1915, for furnishing hay for the troops on the Mexican border, a firm agreed to furnish and deliver, f. o. b. cars at designated stations, during the period July 1 to September 30, 1915, in car loads, alfalfa hay in accordance with specifications, at rates of 78.88 and 91½ cents per cwt., during the respective months. By similar contract dated August 5, 1915, the same firm agreed to furnish the same quality of hay during the month of October, 1915, at 73½ cents per cwt. About the 15th of September, by reason of an unexpected increase in the troops in the territory covered by the contracts, calls were issued upon the contractor for the immediate delivery of about 233,000 pounds of hay, under the April contract. Deliveries were made within a reasonable time, in the opinion of the depot quartermaster, but not until some time in October, after the expiration of the contract and within the period covered by the later contract.

Held, that the hay having been ordered under the contract of April 26, 1915, for delivery under said contract, to meet needs arising during the period covered by said contract, payment could only be made in accordance with the terms thereof. *Held further*, that if the contractor unreasonably delayed in filling orders given under said contract, the proper remedy was to decline to accept deliveries when tendered as under such contract, but "having accepted said deliveries, the Government is estopped from paying contractor otherwise than at the rate fixed by said contract, subject, of course, to a deduction for any and all actual damages occasioned the Government by any unreasonable delay on the contractor's part in making such deliveries."

(Comp. W. W. Warwick, Jan. 3, 1916.)

ENLISTED MEN: Employment as laborers.

An enlisted man of the Coast Artillery Corps while detailed for duty with the Organized Militia of a State was employed, by permission of his commanding officer, as laborer in installing dummy armament in the militia armory at an agreed compensation of \$2.25 per day.

Held, that the employment under the conditions stated was incompatible with the status and obligation of an enlisted man; that if the work was such as could be required of him under his general obligations as a soldier he was not entitled to additional pay therefor, and that if it was proper to detail him to perform the duty so as to entitle him to extra duty pay therefor, the per diem prescribed by law for extra duty was the measure of his allowance.

(Comp. W. W. Warwick, Dec. 10, 1915.)

HEAT AND LIGHT: Allowances under varying conditions to officer on commutation status.

In the case of an officer whose maximum allowance of quarters was seven rooms, decision was requested as to the proper basis of payment of commutation of heat and light under the following condition: At Washington, D. C., on duty October 1-10, 1915, he occupied private quarters consisting of 11 rooms, and October 11-15, 1915, he occupied private quarters consisting of 7 rooms. On October 15, 1915, he took station at the Medical Supply Depot, New York City, and occupied two private rooms until November 30, 1915, his family having continued to occupy private quarters consisting of seven rooms in Washington. On November 30, 1915, he left his station on leave of absence for two months, and during the month of December, while on leave of absence, he occupied quarters consisting of seven rooms in Washington, D. C.

Held, that the officer's maximum allowance of quarters being seven rooms and he having occupied that many or more October 1-14, he was entitled to commutation of heat and light for seven rooms for the said period; that from October 15 to November 30, having occupied only two rooms as quarters in New York, he was entitled to commutation of heat and light for only two rooms for said period; that he was entitled to no commutation for heat and light for the month of December, 1915, for the reason that no quarters were occupied by himself or his family at his official station during said period, and that there is no authority of law for furnishing heat and light for quarters occupied by an officer's family at any place other than his official station.

(Comp. W. W. Warwick, Jan. 31, 1916.)

PUBLIC PROPERTY: When shipping officer is responsible for loss.

A surveying officer designated to ascertain responsibility for the loss of a box of hats which was loaded with other property in a box car for shipment from Camp Stotsenburg to Manila, P. I., found and reported that the hats were stolen sometime after they were loaded into the car and before the car was sealed, and it was recommended that the railroad company be charged with the value of the hats.

Held, that as the car was loaded by the Government and had not been accepted and sealed by the railroad company, the shipping officer was responsible for the loss; that as the car was shipped sealed, it was his duty to protect the car until accepted and sealed by the railroad company.

(Comp. W. W. Warwick, Feb. 2, 1916.)

PURCHASE OF SUPPLIES: Requirements as to advertising in purchasing motor trucks.

A certain quartermaster having been authorized to purchase two light delivery trucks at a cost not to exceed \$1290 each, did not advertise for proposals, but "after obtaining prices, specifications, and personally examining into the merits, hill-climbing ability, and cost of maintenance and operation he decided that the ——— truck

was the most suitable and economical for the purpose for which required, and the purchase was made accordingly."

Held, that the trucks having been purchased without affording an opportunity to other dealers to bid in a competitive way on specifications embodying requirements similar to those which were to be met by the make of truck selected, such purchase was contrary to the provisions of Section 3709, Revised Statutes. The auditor's disallowance was affirmed. (See Bul. No. 14, War Department, 1915, p. 8.) (Comp. W. W. Warwick, Jan. 13, 1916.)

DECISIONS OF THE COURTS.

(Digests prepared in the office of the Judge Advocate General.)

CONTRACTS: Unforeseen difficulties in performance of.

A certain steel company was awarded a contract for furnishing the Government with 18-inch armor plate in conformity with specifications and drawings attached and made a part of the contract. The Government engaged to receive the plates when manufactured, tested and approved as provided. The contract contained a clause providing for liquidated damages of $1/30$ of 1% of the contract price of all the armor plate remaining undelivered for each and every day of delay in the completion of the contract not due to "unavoidable causes, such as fires, storms, labor strikes, actions of the United States, and so forth." There was considerable delay in completing deliveries due to alleged difficulties encountered in the manufacture of the plates by reason of disappointment in the application to 18-inch plate of a treatment or face-hardening process deduced from the formula which, it was contended, "the contractor and every other manufacturer of armor plate in this and every foreign country had followed in the manufacture of armor plate, and which was recognized by authorities on the subject as the one which would give the best results." It was asserted that theretofore no face-hardened armor 18 inches in thickness had been manufactured in this or any other country and no information respecting the process to be employed in its manufacture was obtainable. The contractor contended that the causes of the delay were unavoidable and unforeseen by both parties when the contract was made and that the delays were therefore excusable and of the character described in the contract, that is, "unavoidable causes, such as fires, storms, labor strikes, actions of the United States and so forth." The Ordnance Department, however, made a deduction of \$7,564.08 as resulting liquidated damages under the contract. The contractor brought suit in the Court of Claims to recover the amount so deducted, and from an adverse decision of that court appealed to the Supreme Court. In sustaining the decision of the Court of Claims the Supreme Court, among other things, said:

"Ignorance of the scientific process necessary for face-hardening 18-inch armor plate is asserted to be an unavoidable cause of the character of the enumeration of article 8 of the contract, that is, 'such as fires, storms, labor strikes, action of the United States, etc.' The contention is that it is the same 'genus or kind,' because (1) it was

not foreseeable when the contract was made; (2) was not the result of any act of neglect on the part of the claimant; (3) was not a cause the company could prevent. * * * The contention that the alleged causes can be assigned to such category creates some surprise. It would seem that the very essence of the promise of a contract to deliver articles is ability to procure or make them. But claimant says its ignorance was not peculiar, that it was shared by the world and no one knew that the process adequate to produce 14-inch armor plate would not produce 18-inch armor plate. Yet claimant shows that its own experiments demonstrated the inadequacy of the accepted formula. A successful process was therefore foreseeable and discoverable. And it would seem to have been an obvious prudence to have preceded manufacture, if not engagement, by experiment rather than risk failure and delay and their consequent penalties by extending an old formula to a new condition.

"But even if this cannot be asserted, the case falls within *The Harriman* (9 Wall., 161, 172), where it is said that 'the principle deducible from the authorities is that if what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail defendant. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse performance.'

"And it was held in *Sun Printing & Publishing Ass'n v. Moore* (183 U. S., 642) that 'it was a well-settled rule of law that if a party by his contract charges himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law or the other party. Unforeseen difficulties, however great, will not excuse him.' Cases were cited, and it was said the principle was sustained by many adjudications."

(*Carnegie Steel Co. v. United States*, decided by the Supreme Court of the United States, Feb. 21, 1916.)

HORSES: Claims for loss of, in military service.

In a recent suit brought by an officer of the Army in the Court of Claims, for reimbursement for the loss of a horse in the military service, the court overruled its decision in the *Hardie case* (39 C. Cls., 250), and held that there was no authority for allowance of the claim.

In the *Hardie case* reimbursement was claimed and allowed under the provisions of section 3482, Revised Statutes, as amended by the Act of June 22, 1874 (18 Stat., 193), which authorized the reimbursement of officers for a limited time for horses lost in the military service not due to the fault or negligence of such officer. The time limit for filing such claims was extended by the Act of January 9, 1883 (22 Stat., 401), which provided:

"That the time for filing claims for horses and equipments lost by officers and enlisted men in the military service of the United States, which expired by limitation on the thirty-first day of December, eighteen hundred and seventy-five, be, and the same is hereby, extended to one year from and after the passage of this act; and that all such claims filed in the proper department before the

passage of this act shall be deemed to have been filed in due time,¹ and shall be considered and decided without refiling.

"Sec. 2. That all claims arising under the act approved March third, eighteen hundred and forty-nine, entitled 'An act to provide for the payment of horses and other property lost or destroyed in the military service of the United States,' and all acts amendatory thereof, which shall not be filed in the proper department within one year from and after the passage of this act shall be forever barred, and shall not be received, considered, or audited by any department of the Government."

In the *Hardie case* the court gave particular consideration to the phraseology of the Act of 1883, and held that the words "received, considered, or audited," used in connection with the phrase "any department of the Government," indicated that the statute was intended "to limit the jurisdiction of the executive department of the Government, and not to limit the jurisdiction of this court which has been exercised under the Acts of 1849 and 1874," and that the claim having originated within six years was within the general jurisdiction of the court, which was held not to be affected by the Act of 1883.

In overruling the *Hardie case* Judge Downey, speaking for the court, among other things said:

"The decision in the *Hardie case* seems to us faulty, and after careful reconsideration of the whole matter we conclude that it has been a mistake to follow it, and that it cannot meet with our further approval. It seemed proper enough, in pursuance of the usual policy of following established precedents, to adopt the reasoning of that case to the general effect that the act of 1883 was not intended to deprive this court of its jurisdiction, but it now seems apparent on further investigation that the court in that case was in error in that, among other things, it was taking for granted or assuming the existence of a jurisdiction which at the time of and before the passage of the act of 1883 did not in fact exist at all except as to any possible claims which might have been presented to it or the proper auditor before January 1, 1876."

(*Griffiths v. United States*, decided by Court of Claims, Jan. 17, 1916.)

PAY AND ALLOWANCES: Extra duty pay.

* A former enlisted man brought suit in the Court of Claims for extra duty pay alleged to be due him for services as telephone and telegraph operator at the general hospital, Presidio of San Francisco, from November 8, 1900, when he was transferred to the hospital, to April 24, 1903, when he was discharged by reason of the expiration of his term of enlistment. He was assigned to this duty by verbal orders of the surgeon commanding and was excused from other duties, calls, details, and inspections. The regulations in force at the time provided that "enlisted men of the several staff departments will not be detailed on extra duty without authority from the Secretary of War. They are not entitled to extra duty pay for services rendered in their respective departments." A. R. (1895) 167, (1901) 185. It is provided by statute (R. S., Sec. 1235) that detail for employment at "constant labor" shall be "only upon

the written order of a commanding officer, when such detail is for ten or more days."

Held, that while section 1235, Revised Statutes, was not intended to preclude a recovery of extra duty pay due where there had been a detail to extra duty by competent authority, although not in writing, and when extra duty entitling the enlisted man to extra pay under the statute had been actually performed, it was evident that the services for which the claimant sought extra compensation was not extra duty within the statute, inasmuch as he was on regular duty pertaining to the hospital service, which he as a member of the Hospital Corps was bound to perform without extra pay in accordance with the Act of July 13, 1892 (27 Stat., 120), which provided, in substance, that all necessary hospital services shall be performed by the members of the Hospital Corps.

(*United States v. Ross*, decided by the Supreme Court, Jan. 10, 1916.)

In *United States v. Lincoln C. Andrews* (decided Feb. 21, 1916), the Supreme Court of the United States affirmed the judgment of the Court of Claims allowing an officer of the Army half pay for time during a certain leave of absence granted in excess of the statutory allowance prescribed by Revised Statutes 1265, the War Department having granted the leave with half pay for a definite period and afterwards notified the officer that while his leave of absence was not revoked his absence thenceforth would be without pay.

The court held that the pay of an officer of the Army is a statutory incident of the office; that the statute prescribes the pay of an officer while on leave, and that it is beyond the power of the executive authority to grant a leave of absence on condition that the pay shall be other than what the statute prescribes; and further that the acceptance of a leave assumed to have been granted upon such condition does not constitute a legal waiver or estoppel.

In *Butler v. Sheriff of Columbia County, Florida* (decided Feb. 21, 1916), the Supreme Court of the United States reviewed the legality of a statute of the State of Florida, which is similar to that of the majority of the States of the Union, requiring citizens to work on the public roads. It was contended that the statute imposed involuntary servitude in violation of the 13th Amendment, and that its enforcement would deprive persons of their liberty and property without due process of law contrary to the 14th Amendment.

The court held that from Colonial days to the present time conscripted labor has been much relied on for the construction and maintenance of roads, the system having been introduced from England; that the 13th Amendment was adopted with reference to conditions existing since the foundation of the Government, and it introduced no novel doctrine with respect to services always treated as exceptional and "certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as service in the army, militia, on the jury, etc." The court further held that there was no merit in the claim that a man's labor is property the taking of which without compensation by the State for the building and maintenance of public roads violates the due-process clause of the 14th Amendment.

BULLETIN 13.

BULLETIN }
No. 13. }

WAR DEPARTMENT,
WASHINGTON, May 6, 1916.

The following digest of opinions of the Judge Advocate General of the Army, for the months of March and April, 1916, and of certain decisions of the Comptroller of the Treasury, together with notes on military justice prepared under the direction of the Judge Advocate General, is published for the information of the service in general.

[2375247 A—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

TASKER H. BLISS,

Major General, Acting Chief of Staff.

OFFICIAL:

H. P. McCAIN,

The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

CONTRACTS: Annual supplies—quantity contemplated by the agreement.

A contract was entered into with a concern for furnishing for the Army such quantity of ash cans as required for the Army during the fiscal year, the estimated number being stated in the advertisement as 4,000 cans. Subsequent to the making of the contract, a new use was found for ash cans—their use as coffee boilers, a purpose in no wise related to their normal use—and as a result the number required was greatly in excess of the original estimated quantity.

Held, that the contractors were obliged to furnish ash cans under their contract only for the purpose contemplated by the agreement, that is, their use as ash receptacles or some related use, and were not obliged to furnish them for use as coffee boilers.

(76-700, J. A. G., April 15, 1916.)

COURTS-MARTIAL: Power to reduce a noncommissioned officer in grade.

The question was submitted whether a general court-martial has power to reduce a noncommissioned officer to a lower grade.

Held, that while by sentence of a court-martial a noncommissioned officer may be reduced to the ranks, a court-martial has no power to reduce him to a lower grade of noncommissioned officer, as the latter procedure involves an appointment which a court-martial is not authorized to make.

(6-151.1, J. A. G., April 15, 1916.)

DETACHED SERVICE: Officer performing staff ride exercises.

An officer who in the performance of staff ride exercises was accompanied by troops requested that he be credited with duty with troops for the period so engaged, under the act of April 27, 1914 (38 Stat., 357), which provides:

"Temporary duty of any kind hereafter performed with United States troops in the field for a period or periods the aggregate of which shall not exceed sixty days in any one calendar year * * * shall * * * be counted as actual presence for duty with such (troop, company, etc.) organization or command."

Held, that, as it is not essential to a staff ride that there be any troops present and that the presence of a small body of troops does not alter the character of the exercises, the officer was not entitled to credit for service with troops as requested.

(6-124.4, J. A. G., April 13, 1916.)

ENLISTED MEN: Promotion to grade of second lieutenant.

In the Act of July 30, 1892 (27 Stat., 336), providing for a competitive system of examination of enlisted men for commission as second lieutenants, one of the requirements of candidates is that they must have served honorably not less than two years in the Army. The Act of March 3, 1911 (36 Stat., 1045), prescribes that the order of appointments to fill vacancies in the grade of second lieutenant shall be, (1) cadets graduated from the United States Military Academy, (2) enlisted men whose fitness has been determined by competitive examination, and (3) candidates from civil life.

Held, in the case of an enlisted man who had not served two years in the Army, that he was not eligible for examination and appointment as of the enlisted men class, but that he was eligible for examination for appointment as of the civilian class, the term "candidate from civil life," etc., in the Act of 1911 evidently being intended to impose no other restriction than that of age limits, as it would be unreasonable to deny a man the right of appointment as a second lieutenant on account of his having had service in the Army as an enlisted man.

(64-213, J. A. G., April 18, 1916.)

PAY AND ALLOWANCES: Officer in arrest and confinement; deduction of pay.

An officer was adjudged in contempt of court in connection with divorce proceedings and confined in jail for several days until he had agreed to obey the decree of the court.

Held, that the officer was not entitled to pay for the time he was absent in confinement, as the case came within the sense of the prohibition of paragraph 1371, A. R.

(74-111.4, J. A. G., April 15, 1916.)

PRIVATE PROPERTY: Civilian clothing lost by enlisted men.

A chest containing the personal effects of an enlisted man was broken open while being transported, incident to the service, on a U. S. transport in charge of the Quartermaster Corps. Several

articles of civilian clothing were stolen, including a suit of clothes, extra pair of trousers, hat, and shoes.

Held, that the soldier was not entitled to reimbursement for the civilian clothing as the Secretary of War could not properly certify that such articles were "reasonable, useful, necessary, and proper" for the soldier "while in quarters, engaged in the public service, in the line of duty," within the meaning of the Act of March 3, 1885 (23 Stat., 350), relating to claims for private property lost or destroyed.

(18-461, J. A. G., April 1, 1916.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

CIVILIAN EMPLOYEES: Burial expenses of clerk, Quartermaster Corps.

A clerk of the Quartermaster Corps with station at Fort Sam Houston, Texas, died while on leave of absence without pay at San Antonio, Texas. The body was buried at private expense and the widow applied for reimbursement. In the Sundry Civil Appropriation Act of March 3, 1915 (38 Stat., 843), provision was made for—"interment, or preparation and transportation to their homes, of the remains of civil employees of the Army in the employ of the War Department who die abroad, in Alaska, in the Canal Zone, or on Army transports, or who die while on duty in the field or at military posts within the limits of the United States; * * *."

Held, that reimbursement was not authorized because the appropriation contemplates an expense to be incurred by the Quartermaster Corps, and further, that the appropriation is only applicable in the case of a civilian employee who dies while on duty in the field or at a military post, and that the instant case did not come within either of these conditions.

(Comp. W. W. Warwick, April 12, 1916.)

CONTRACTS: Breach; settlement of damage by Auditor.

A contractor for furnishing oats to the Quartermaster Corps, having failed to make a certain delivery at the time required, a supply of oats for temporary needs was purchased in the open market in accordance with the terms of the contract, at an excess cost of \$64 over the contract rate. The contractor refused to remit this amount and the question was submitted whether the disbursing officer was authorized to deduct it from a voucher covering supplies furnished by the contractor under a subsequent contract.

Held, that such deduction was proper, but that as the contractor had declined to certify the voucher with such deduction therefrom and to accept payment of the net amount, the papers should be forwarded to the Auditor for the War Department for settlement.

(Comp. W. W. Warwick, Feb. 12, 1916.)

HEAT AND LIGHT: Conditions governing payment of commutation of heat.

Certain officers receiving commutation of heat (A. R., 1036), purchased their coal from the Quartermaster Corps at the Government contract rate.

Held, that the provision in the act of March 4, 1915 (38 Stat., 1069), "for commutation of quarters, and of heat and light, to commissioned officers, * * *" contemplates the payment of commutation of heat to officers only where it is impracticable to furnish them fuel in kind, and that if the Government can and does furnish fuel in kind to an officer, whether occupying public quarters or quarters other than public, he is entitled to no commutation for heat and should be charged for only the fuel supplied him in excess of his authorized allowance for the quarters occupied.

(Comp. W. W. Warwick, March 9, 1916.)

PAY AND ALLOWANCES: Liability of soldier's deposits for indebtedness to United States and to post exchange.

A soldier who was discharged for fraudulent enlistment owed \$1.50 to a quartermaster laundry and \$3 to a post exchange, and the question was submitted whether these debts were properly chargeable against pay and clothing credits and, if not, whether they were a proper charge against a deposit of \$10 made by the soldier as shown by his deposit book.

Held, that the repudiation of the soldier's contract for fraud placed him in the position of having legally earned no pay or allowances, and having earned none there were none unpaid with which to pay his indebtedness to the laundry and post exchange, except that the laundry service having been performed by the government at public expense should be regarded as an advance of pay and the appropriation for the laundry should be reimbursed from the appropriation for the pay of the Army.

Held further, that the post exchange could not be reimbursed under the same principle nor could such indebtedness be satisfied from the soldier's deposits for the following reasons; viz: Section 1305, Revised Statutes, as amended (34 Stat., 246) declares that soldiers' deposits shall be exempt from liability for their debts. This exemption has been held not to apply to any indebtedness to the United States (16 Comp. Dec., 566), but an indebtedness to a post exchange is not an indebtedness to the United States and the Government assumes no liability therefor further than to use a part of the soldier's pay, if there be any, to protect the exchange. Therefore, the inhibition in section 1305, R. S., that deposits shall be exempt from liability for the soldier's debts applies to any indebtedness which is not an indebtedness to the United States, and as a post exchange, in the purview of this statute, is on the same footing as an individual, the soldier's deposits and interest were payable to him without diminution on account of such indebtedness.

(Comp. W. W. Warwick, April 20, 1916.)

NOTE.—Paragraph 1368, A. R., will be amended so as to conform with the above ruling.

TRANSPORTATION: Excess baggage on change of station.

In the shipment of an officer's baggage on change of station an automobile was loaded in the car with household goods and professional books. The excess weight of the officer's baggage allowance consisted of 1,370 pounds of household goods and the automobile weighing 2,000

pounds. The household goods and books took a carload rating of \$1 per cwt. and the rate on the automobile, which was not included in the carload rating, was \$6 per cwt.

Held, that the proper method of computation was as set forth in 22 Comptroller's Decisions, 195, as follows:

"The reimbursement required to be collected from an Army officer for the transportation of his excess over the regulation change of station allowance of baggage is the proportionate charge for the carload shipment of which it forms a part, and in addition thereto the total charge for articles not included in said carload rating;" and further, that when an officer ships baggage on change of station, whether all the shipment is on a Government bill of lading or a part is on one or more commercial bills of lading, and the total shipment, including an automobile, exceeds the allowance, any excess over the allowance shall be considered to be in whole or in part, as the case may be, caused by the weight of the automobile, and such excess will be at the cost of the officer.

(Comp. W. W. Warwick, April 24, 1916.)

NOTES ON ADMINISTRATION OF MILITARY JUSTICE.

(Prepared under the direction of the Judge Advocate General of the Army upon the review of records of general courts-martial trials.)

EVIDENCE: Necessary, neglect to procure.

A soldier was recently convicted of feloniously assaulting another by striking him on the head with a dangerous instrument, and sentenced to be dishonorably discharged, with the usual forfeitures, and to confinement at hard labor in a penitentiary for two years. Different opinions could reasonably be held as to whether or not the instrument was of an essentially dangerous character. It was proved that the assault upon the soldier rendered him unconscious and that he was on that account placed upon an operating table, but the record discloses no effort to procure evidence as to the extent and character of the injuries or as to whether or not an operation was performed. Evidence in these respects should have been procured, especially in view of the alleged dangerous character of the instrument. In the absence of such evidence it was incompetent for the judge advocate in his argument to inform the court as to the nature of the injuries inflicted upon the assaulted soldier.

An officer was recently tried upon and acquitted of a charge of drunkenness, it being alleged in one specification that he had become so drunk as to make it necessary to place him in a hospital. The physician who advised this course and who attended the officer while in the hospital was not called as a witness nor does the record disclose any reason for his not being called. The physician was obviously a necessary witness, the other witnesses having given no satisfactory evidence as to the officer's condition at the time of his removal to the hospital nor any whatever as to his condition for the three days while therein. Failure to procure the evidence of the physician appears to have been a serious neglect of duty on the part of both the judge advocate and the court.

BULLETIN 18.

BULLETIN }
No 18. }

WAR DEPARTMENT,
WASHINGTON, *July 8, 1916.*

The following digest of opinions of the Judge Advocate General of the Army for the months of May and June, 1916 (two opinions printed in full), and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2422420, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Major General, Chief of Staff.

OFFICIAL:

H. P. McCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

JUNE 5, 1916.

MEMORANDUM for The Adjutant General.

Subject: Construction of certain provisions of the national defense act approved June 3, 1916.

Upon the questions submitted by you in your memorandum of the 24th ultimo, I heretofore, as you know, came to certain tentative conclusions with which I acquainted you. In the light of your recent supplemental memorandum concerning these tentative conclusions, which I have considered with great care, I am now prepared to make official response to your inquiries, for the purpose of setting them out in the language in which they are expressed and considering them in the order submitted:

FIRST.

"Details in staff departments.—The present law provides that an officer detailed in The Adjutant General's Department with the grade of major, on promotion to the grade of lieutenant colonel, may be redetailed in the department without regard to the detached-service law for other periods of four years. Does the language of this act, providing that when an officer is so promoted 'he may be permitted to serve out the period of his detail,' repeal the present provisions of law?"

It is my opinion that the provision of the bill to which you refer relates not to the detached-service law, but solely to the provisions of law fixing the number of officers of the grade to which the detailed officer is promoted in the staff corps in which he is serving, and serves to increase temporarily that number so as to permit of his retention if desirable.

SECOND.

*"Porto Rican Regiment of Infantry (sec. 21).—*This section of the bill provides for the *appointment* from the senior captains in regimental rank of the Porto Rican Regiment of Infantry to fill vacancies in the grades of lieutenant colonel and major, created by this act. Should captains so appointed be examined under the general rules prescribed for advancement by promotion?"

My opinion is that the provision of the bill to which you refer does not require that the appointment shall be subject to the examination prescribed for advancement by promotion. If it should be held otherwise no conceivable meaning could be assigned to the exception in the first paragraph of section 21, wherein it is provided that—

"All vacancies created by this act or occurring hereafter in commissioned offices of said regiment above the grade of second lieutenant and below the grade of colonel shall, *except as hereinafter provided to the contrary*, be filled by promotion according to seniority in the several grades and within the regiment, subject to the examination prescribed by section 3 of the act of Congress * * *," etc.

And, additionally, the word "appointments," as used in the provision under examination, would appear to have been used in contradistinction to the "promotion" mentioned and contemplated in the said first paragraph of said section prescribing a system of examination.

Relative to the clause requiring appointment to the field grades in this regiment to be made from "the senior captains in regimental rank of the Porto Rican Regiment mentioned in the act of March 4, 1915," you ask in your supplemental memorandum the further questions:

(a) "Does the clause mean the four captains at the head of the list, or does it describe all the captains mentioned in that act as the senior captains?" and

(b) "Must the field officers be appointed from the four at the head, or may any one of them be appointed lieutenant colonel, leaving the majority to the others, attention being invited to the last proviso of section 21?"

Responding to these questions as I understand them, it is my view (a) that the clause has reference to the four captains at the head of the list mentioned in the act of March 4, 1915. If this were not so and the reference were to all the captains mentioned in that act no meaning whatever could be assigned to the word "senior," which, in view of the subject matter of the clause, is a keyword thereof. The word "senior" conflicts with such a general reference. If Congress had intended to refer to all of the captains mentioned in that act it could have done so by omitting the word "senior" altogether; but had it desired to go further and describe the entire class the adjective "permanent" used as descriptive of those officers mentioned in said act very appropriately could, and probably would, have been used for that purpose.

And it is my further view (b) that the four field officers must be appointed from the four seniors above mentioned, but that in view of the fact that the bill provides for "appointments," the appoint-

ments are in no respect to be governed by seniority among the four eligibles, and that any one of them may be appointed to any one of the field offices without regard to his rank as to the other three.

In this connection I may also say that in the absence of a more specific inquiry I do not now consider, as I do not perceive the relevant effect of, the last proviso, to which my attention was invited.

THIRD.

“Examination of field officers.”—In section 24 it is provided ‘that the provisions of existing law requiring examinations to determine fitness for promotion of officers of the Army are hereby extended to include promotion to all grades below that of brigadier general.’ It is further provided ‘that all vacancies created or caused by the foregoing provisions of this section in grades above that of second lieutenant shall be filled by promotion according to law existing on and before the date of approval of this act, and subject to the examinations prescribed by existing law.’ These two paragraphs of the bill are in conflict. To show the practical effect of these provisions, the number of lieutenant colonels of Infantry, for example, promoted to the grade of colonel due to the detached list is ten. The number of promotions from lieutenant colonel to colonel, due to the increase in the Infantry arm, on July 1, 1916, by seven regiments, is seven. The literal interpretation of the two provisions of the act would apparently require ten lieutenant colonels of Infantry to be promoted as now provided by law without examinations and eleven to be promoted with examination.”

The difference of language is too manifest to be disregarded or composed. There is no conflict between a rule which requires an examination in one case and not in the other. It is a matter of difference, not conflict. Therefore there is no room for interpretation. Where legislative language is so plain, we do not have to seek the legislative reasons for the different rules, though the suggestion does come that Congress conceived that the detached service list should be organized first and desired to avoid the delay due to the examinations; and perhaps also that, inasmuch as senior officers for the most part will be promoted to the grades of lieutenant colonel and colonel on that list, a presumption of demonstrated competency was made in their favor. Upon the other side it may have been presumed that there would be of necessity some delay in establishing the new organization, affording, without prejudicing the service thereby, an opportunity for examination for the vacancies due to the increments.

Such was my tentative view, and upon a careful reconsideration I am not convinced of any error therein, notwithstanding the reasons advanced in your supplemental memorandum for a contrary conclusion. You say that—

“The act specifically provides for the promotions incident to the detached list and those due to the first increment in organizations of the Army to become effective at the same time, July 1, 1916; and this office can not agree with the suggestion that Congress conceived that the detached service list should be organized first. It is suggested that that portion of the presumption be omitted from the discussion, leaving it to the Secretary of War to determine adminis-

tratively the officers who must be examined and who must not be examined under the law."

It seems to me rather futile to admit that the law clearly prescribes those who are and those who are not to be examined, only to have the Secretary of War disregard the distinction and substitute administrative will for the legal rule. That would not only put the Secretary in an unenviable position, without general rule or policy to guide him, but would transgress what is plainly prescribed. Moreover, I think it is wrong to say that the bill specifically provides that the promotions incident to the detached list and those due to the increment shall become effective at the same time, July 1, 1916. On the contrary, it expressly enjoins that "on July 1, 1916, the line of the Army shall be increased by 822 extra officers * * *." And, again, that—

"The extra officers, together with the 200 detached officers provided for by the act of Congress approved March 3, 1911, *shall, on and after July 1, 1916, constitute the Detached Officers' List.*"

So, then, in legal theory at least, the promotions necessary to supply the officers for the Detached Officers' List must be made on *July 1, 1916*, and the detachments made as soon as practicable thereafter. As regards the increments, however, the language is significantly different. As to them, it is provided:

"The increases in the commissioned and enlisted personnel of the Regular Army provided by this act shall be made in five annual increments * * *. Officers promoted to vacancies created or caused by the addition of the first increment shall be promoted to rank from July 1, 1916 * * *."

This language does not direct that the actual promotions shall be made on July 1, 1916, but plainly recognizes the fact that the promotion may not be made on that date, by providing, in effect, that whenever made the promotions shall date from July 1. If the difference exists, as is conceded, it ought to be preserved and not destroyed by substituting for it an administrative procedure which, as I see it, has no basis in the bill or other law.

FOURTH.

"*Order of filling vacancies in the grade of second lieutenant created by this act (sec. 24).*—The law provides '(2) under the provisions of existing law, of enlisted men, including officers of the Philippine Scouts, * * *.' Officers of the Philippine Scouts are not enlisted men, and under the provisions of existing law they are examined for appointment, as civilians."

The term, "enlisted men, including officers of the Philippine Scouts," is designed to combine enlisted men and officers of the Philippine Scouts into a single, joint, eligible class, having preference in accordance with the act. The officers of Philippine Scouts, being closely associated and placed in the preferential class conjointly with enlisted men, ought to have the same qualifications as enlisted men. This would appear to be so by the mere association of terms, and this view is additionally supported by the use of the introductory words "under the provisions of existing law," which, in a sense, suggests that those provisions of law which establish the eligibility of enlisted men should apply equally to the officers of the scouts. The officers of scouts to be eligible by this provision should

have, therefore, the qualifications prescribed by existing law for enlisted men. See act of July 30, 1892 (27 Stat., 336). It would follow, then, that only those officers of the scouts who are citizens of the United States or have declared their intention to become such and who possess the other prescribed qualifications are eligible to this class.

I first thought that inasmuch as the substantive part of the provision used the term "enlisted men, including officers of the Philippine Scouts," and the proviso used simply the term "enlisted men," omitting the words "including Philippine Scouts," Congress thus indicated a distinction between the two as to eligibility based upon service. But you very properly say:

"It seems that if the officers of the scouts are to have the qualifications prescribed by law for enlisted men, they should have the same length of service among other qualifications."

Upon further consideration, I think that is the result to be reached upon fair construction, notwithstanding the difficulty of the language indicated. Certainly the provisions establishing eligibility ought to be liberally construed in behalf of the beneficiaries. Furthermore, it could well be maintained that inasmuch as the substantive part of the provision established an order consisting of both enlisted men and officers of scouts—the word "including" being used thus cumulatively—the proviso has reference to all included within the order, and that its sole purpose was to change the rule from the present two years' to one year's service without discriminating as between the classes constituting the order.

FIFTH.

"*Transfer of officers (sec. 25).*—The bill provides for the promotion or transfer without promotion of officers of one branch of the line of the Army to another below the grade of lieutenant colonel, subject to certain examinations. Do officers so transferred take their place in the lineal list of the arm to which transferred according to relative rank existing at the time of transfer?"

In my judgment the officers transferred in accordance with the provision should take their place in the lineal list of the arm to which transferred according to their relative rank at the time of the transfer. I reach this conclusion principally for the reason that it is expressly declared that the transfers provided by this section are "for the purpose of lessening as much as possible inequalities of promotion due to the increase in the number of officers of the line of the Army *under the provisions of this act*"; that is to say, that in making these transfers the inequalities of promotion that are not brought about by the increases due to this act should not be admitted to consideration. On principle, and having in view the restricted purpose of the transfers here authorized, I can see no reason why the officers transferred for this purpose should have their relative rank disturbed; indeed, I do not see how their relative rank could be disturbed except upon considerations based upon inequalities due to increases not caused by this act. However, for the present, I can look at the question only as it is presented; that is, in its large and indefinite outlines; and it may well be that administrative and other proper considerations may arise to suggest, if not require, modification of this general view.

SIXTH.

*"Limits of age for enlistment (sec. 27).—*The act provides 'that no person under the age of 18 years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians.' Does this provision supersede the present provision requiring that no person shall be enlisted between the ages of 21 and 18 without the consent of their parents or guardians, or does it extend the provision?"

The provision of existing law that has to be considered here is that found in section 1117, Revised Statutes, reading as follows:

"No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardian: *Provided*, That such minor has such parents or guardian entitled to his custody and control."

The provision of the act, "that no person under the age of 18 years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardian," is in *pari materia* with, and must be construed with and as an amendment of, said section 1117, Revised Statutes, and has the effect of substituting the age of 18 for the age of 21 years as there prescribed. The result must be to render unnecessary the parental consent between the ages of 18 and 21 years which is required by said section 1117, Revised Statutes.

SEVENTH.

"The organization of headquarters companies by the bill gives regimental adjutants service with troops in the meaning of the detached service law. Does their credit for this service begin on approval (of the bill) by the President or on some other date?"

As regards the application of the bill to existing regiments, it is self-executing and operates from the date of its approval upon the headquarters company whose elements are already in existence and by the bill are combined into the single organization as denominated. Even if a minor element or so be lacking all substantial elements of the new organization are already in existence, and such a slight deficiency would not prevent the immediate operation of the act. A regimental adjutant, therefore, actually present in a duty status with respect to such a headquarters company is, and must be held to be, on duty with a company within the meaning of the detached service law.

EIGHTH.

*"Application of section 24 with reference to increase in five increments.—*The Inspector General's Department, for example, is increased by one colonel. Does the bill make it mandatory that this increase should take place only when an entire unit is reached by the sum of successive previous increments, or may it legally be made at the date of some previous increment; for example, at the time of the third increment of the case in point the Inspector General's Department will have acquired $3/5$, a major fraction of one colonel."

In dealing with fractions the administrative rule would naturally be, where none other is prescribed, to regard major fractions as units,

carrying the minor fractions forward for future adjustment. I can not conceive of the slightest reason why in the example cited such regard should not be had for the major fraction so that, applying the rule, the bureau mentioned would be entitled to the increase of one colonel upon the third increment. Additional support for this view is to be gathered out of the act, wherein it requires that the increments shall be one-fifth of the total.

(64-221.4.)

E. H. CROWDER,
Judge Advocate General.

JUNE 19, 1916.

MEMORANDUM for the Chief of the War College Division of the General Staff.

Subject: Interpretation of section 111 of the national defense act of June 3, 1916.

1. Your memorandum of June 17 requests an opinion on certain questions which will be hereinafter stated in connection with the answers thereto.

2. Question 1:

"Will the National Guard when drafted into the Federal service, as provided in sec. 111, act approved June 3, 1916, be available for an offensive campaign in Mexico?"

Section 111 of the national defense act provides:

"When Congress shall have authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those of the Regular Army, the President may, under such regulations, including such physical examination, as he may prescribe, *draft into the military service of the United States*, to serve therein for the period of the war unless sooner discharged, any or all members of the National Guard and of the National Guard Reserve. All persons so drafted shall, from the date of their draft, *stand discharged from the militia*, and shall from said date be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Volunteer Army, and shall be embodied in organizations corresponding as far as practicable to those of the Regular Army or shall be otherwise assigned as the President may direct * * *."

The power of Congress to provide for drafting into the Army of the United States the citizens of the country capable of bearing arms was exercised during the Civil War, and its right to do so was upheld by the courts. The persons so drafted, though drawn *from* the militia, were not called forth as such under the militia clauses of the Constitution, but were incorporated into the armies of the United States under the constitutional power to raise armies. (*Kneedler v. Lane*, 45 Pa. St., 238.) Section 111 provides that the persons drafted pursuant to its provisions shall "*stand discharged from the militia*," thus clearly indicating that the persons so drafted shall be no longer regarded as militia but as a part of the Army of the United States. Being no longer militia their employment is not restricted to the purposes for which the militia as such may be employed—the execution of the laws, suppression of insurrection, and repelling of invasion. They are subject to the orders of the President of the United

States, like members of the Regular or Volunteer Army, and may be used for general war purposes. The evident purpose of the authority to draft (sec. 111) and of the oaths prescribed for officers (sec. 73) and for enlisted men (sec. 70) is to make the National Guard available for general war purposes. The question is answered in the affirmative.

3. Question 2:

"Assuming the answer (to the preceding question) to be 'Yes,' if it is desired to use the existing units of the Organized Militia for service in Mexico, may the President elect either of the following methods of bringing them into the service of the United States:

"(a) Draft them into the service under the act of June 3, 1916; or

"(b) Incorporate them into the Volunteers under the act of April 25, 1914; or

"Is the President now restricted only to (a)?"

It should first be observed that the President may neither draft members of the National Guard nor incorporate the National Guard into a Volunteer Army without further specific authorization by Congress. Section 111 of the national defense act provides that:

"When Congress shall have authorized the use of the armed land forces of the United States for any purpose requiring the use of troops in excess of those of the Regular Army, the President may * * * draft * * *"

A proposed joint resolution designed to give the President the power to draft the National Guard under section 111 was submitted by this office to the Chief of Staff June 15, 1916.

Section 2 of the Volunteer Army act of April 25, 1914, provides:

"That the volunteer forces shall be raised * * * *only after Congress shall have authorized the President to raise such a force.*"

It is, therefore, evident that the answer to the present question depends upon the authority that Congress may give in the future. It may authorize either of these methods for the employment of the National Guard, and, should it authorize one and not the other, the President would be limited to the methods authorized and *could exercise no election* as between the two methods.

4. Question 3:

"Assuming that the President has the option of employing *either* method, can he draft part of the National Guard under the new law to meet a sudden emergency and use the remainder under the act of April 25, 1915, as a nucleus for a more deliberate volunteer organization?"

The above question assumes that Congress has, pursuant to section 111 of the national defense act, authorized a draft of the National Guard, and has, pursuant to the Volunteer Army act of April 25, 1914, authorized the raising of a volunteer force. Section 111 provides that:

"The President may * * * draft * * * *any or all* members of the National Guard and of the National Guard Reserve."

It is, therefore, clear that the President, in exercising the power of draft, is not required to draft the National Guard as a whole, but may draft a part thereof, in his discretion. He could, therefore, utilize the remainder of the National Guard as a part of a Volunteer Army in the manner prescribed in section 3 of the Volunteer Army

act. It may be here observed, however, that enlistment in the Volunteer Army, is a voluntary matter, and the President can not compel the National Guard organizations to enter the same.

(58-141.)

E. H. CROWDER,
Judge Advocate General.

ARMY RESERVE: Furlough of enlisted men indebted to the United States.

The following questions were submitted:

"Should a man who is otherwise eligible be furloughed to the Army Reserve at the expiration of *three years'* service, under the following conditions:

"(a) When he is indebted to the United States for court-martial fines.

"(b) When any other indebtedness of the soldier to the Government exceeds amounts due him."

The act of August 24, 1912 (37 Stat., 591), providing for a seven-year enlistment—the first four years to be with the colors and the last three years on furlough and attached to the Army Reserve—contains the proviso that an enlisted man, at the expiration of *three years'* continuous service with his organization—

"upon his written application, may be furloughed and transferred to the Army Reserve in the discretion of the Secretary of War."

Held, that the statute, which gives the Secretary of War discretion to furlough the soldier, does not mean that the transfer must necessarily be effected immediately after the expiration of the three years' service, and that if some obstacle intervenes the furlough may take place as soon thereafter as practicable upon the removal of the obstacle.

Answering the questions specifically:

(a) The Secretary of War may either furlough the soldier to the reserve immediately after the completion of the three years' service with his organization, remitting the unexecuted part of the forfeitures imposed by sentence of court-martial, or may grant the soldier's application to be furloughed to the reserve to take effect immediately after the forfeitures have been fully executed.

(b) Where the indebtedness of the soldier to the Government, not including court-martial forfeitures, exceeds the amount due him the grant of the soldier's application to be furloughed to the reserve should be deferred until sufficient pay accrues to satisfy his indebtedness to the Government.

(72-530, J. A. G., May 15, 1916.)

CHIEF MUSICIAN: Power of regimental commander to reduce to ranks.

The question was submitted whether a chief musician of Cavalry could be reduced to the ranks by the regimental commander.

Held, that such musicians obtain their grade, like other noncommissioned officers, by enlistment as private and subsequent appointment (act of Mar. 2, 1899, sec. 2, 30 Stat., 936), and it follows that they may be reduced to the ranks in like manner as other noncommissioned officers, viz, by sentence of court-martial or by order of the commanding officer having authority to appoint them.

(6-151.1, J. A. G., May 19, 1916.)

CIVILIANS: Medical supplies for, at camps of instruction.

The commanding officer of the camp at Plattsburg, N. Y., requested a supply of first-aid packets and first-aid instruction packets for use of civilian members of the camp.

Held, that in view of the broad powers of discretion conferred upon the Secretary of War by section 54, national defense act, in the matter of providing for military camps of instruction and training for civilians, including authority "to furnish at the expense of the United States uniforms, subsistence, transportation, and medical supplies to persons receiving instruction at such camps," the first-aid packets requested could properly be furnished if regarded by the Surgeon General as reasonably necessary for the civilians in training at the camp.

(80-131, J. A. G., June 13, 1916.)

COMMUTATION OF QUARTERS, ETC.: Officers on temporary duty at training camps.

In section 5 of the national defense act, approved June 3, 1916, relating to the General Staff Corps, it is provided—

"Not more than one-half of all of the officers detailed in said corps shall at any time be stationed, or assigned to or employed upon, any duty in or near the District of Columbia."

The question was raised with reference to the relief of certain General Staff officers from duty in Washington, whether if they be directed to report at certain camps, like that at Plattsburg, N. Y., for temporary duty they could "retain station in Washington, not for duty, but for the purpose of drawing commutation of quarters, heat, and light."

Held, that as the law requires assignment of the officers, upon the approval of the act, to some other station than one in or near the District of Columbia they could not retain station in Washington for any purpose; and that if not assigned to some other station than the one to which they are temporarily assigned for duty their right to receive commutation of quarters, heat, and light must depend on such temporary assignment.

(6-210, J. A. G., June 1, 1916.)

DENTAL CORPS: As to reorganization of, under national defense act.

Section 10 of the national defense act, with respect to the Dental Corps, is as follows:

"The President is hereby authorized to appoint and commission, by and with the advice and consent of the Senate, dental surgeons, who are citizens of the United States between the ages of twenty-one and twenty-seven years, at the rate of one for each one thousand enlisted men of the line of the Army. Dental surgeons shall have the rank, pay, and allowances of first lieutenants until they have completed eight years' service. Dental surgeons of more than eight but less than twenty-four years' service shall, subject to such examination as the President may prescribe, have the rank, pay, and allowances of captains. Dental surgeons of more than twenty-four years'

service shall, subject to such examination as the President may prescribe, have the rank, pay, and allowances of major: *Provided*, That the total number of dental surgeons with rank, pay, and allowances of major shall not at any time exceed fifteen: *And provided further*, That all laws relating to the examination of officers of the Medical Corps for promotion shall be applicable to dental surgeons."

By section 127 it is provided that "nothing in this act shall be held or construed so as to discharge any officer from the Regular Army or to deprive him of the commission which he now holds therein." The provisions of the act of March 3, 1911 (36 Stat., 1054), for the organization of the Dental Corps are not regarded as repealed by the new act and both statutes should therefore be construed together and the former act be given force except where it appears to be modified by the national defense act. In respect to the above provisions of the new act, questions were submitted and answered as follows:

(a) May the President issue commissions as dental surgeons to the present acting dental surgeons who are within the designated age limits, such commissions to be effective from the date of the approval of the new law? *Answer*: Yes. As the number of dental surgeons authorized by the new act corresponds to the total number of both grades under the act of March 3, 1911—that is, not to "exceed the proportion of one to each 1,000 enlisted men of the line of the Army"—this evidences the purpose of Congress to supersede the grade of acting dental surgeons.

(b) In issuing and making such appointments, may the President, in his discretion, require preliminary examination similar to that prescribed in section 16 as preliminary to the appointment of present veterinarians in the Veterinary Corps? *Answer*: The President may require an examination preliminary to the appointment of acting dental surgeons to the commissioned grade of dental surgeons, in view of the provisions of the act of March 3, 1911, which is regarded as still in force, declaring that:

"Acting dental surgeons who shall serve three years in a manner satisfactory to the Secretary of War *shall be eligible for appointment as dental surgeons*, and, *after passing in a satisfactory manner an examination which may be prescribed by the Secretary of War*, may be commissioned with the rank of first lieutenant in the Dental Corps to fill the vacancies existing therein."

(c) May acting dental surgeons over 27 years of age be appointed or commissioned as dental surgeons? *Answer*: Yes. The act of March 3, 1911, provided for the eligibility of acting dental surgeons "for appointment as dental surgeons" under the conditions prescribed therein, and prescribed the age limits for appointees as acting dental surgeons to be "between 21 and 27 years." It was evidently contemplated that they, having been appointed between the age limits, should be eligible under the conditions specified for appointment as dental surgeons, although over 27 years of age, and this provision should be construed in connection with the present statute so that both will have operation—the age limits prescribed in the act of March 3, 1911, to apply to the eligibility of appointment of existing acting dental surgeons as dental surgeons and the age limits prescribed in the national defense act to apply to all other appointments as dental surgeons.

(d) Should new commissions be issued to members of the present Dental Corps who hold commissions under the act of March 3, 1911, with the rank of first lieutenant? *Answer:* Having in view the fact that the provisions of the national defense act with regard to the Dental Corps are not a complete organization of that corps and do not provide for the repeal of the organization act of March 3, 1911, and that section 127 declares that nothing in that act shall deprive any officer "of the commission which he now holds," this question should be answered in the negative.

(e) May service as contract dental surgeons under section 18 of the act of February 2, 1901 (31 Stat., 752-3), and service in the Dental Corps established by the act of March 3, 1911, whether in the civilian grade of acting dental surgeons or in the commissioned grade of dental surgeons, be counted toward the advanced rank provided in the new law? *Answer:* The act of March 3, 1911, provides that—

"The time served by dental surgeons as acting or contract dental surgeons shall be reckoned in computing the *increased service pay* of such as are commissioned under this act;" while the provisions of the national defense act gives increase in "rank, pay, and allowances according to the length of service as prescribed therein." There is evidently a distinction between the "increased-service pay" authorized by the act of March 3, 1911, and the increase in "rank, pay, and allowances" authorized by the new law, and it appears that while the service specified in this connection may be counted toward longevity pay, it can not be "counted toward the advanced rank provided in the new law," but service as dental surgeon under the act of March 3, 1911, may be counted for the purpose of rank, pay, and allowances under the new law.

(6-227.3, J. A. G., June 8, 1916.)

ENLISTED MEN: As to furlough without pay.

A noncommissioned officer of the Regular Army requested an indefinite furlough without pay and allowances to enable him to accept an appointment as veterinarian in an organization of the National Guard in the service of the United States.

Held, that as the pay of an enlisted man is fixed by law his agreement to waive it would not be binding, and that therefore the furlough requested for the purpose stated could not be granted.

(72-220, J. A. G., June 13, 1916.)

ENLISTED MEN: Discharge by purchase and furlough to the Army Reserve.

A provision in section 29 of the national defense act approved June 3, 1916, reads as follows:

"When an enlisted man is discharged by purchase while in active service he shall be furloughed to the Regular Army Reserve, unless, in the discretion of the Secretary of War, he is given a final discharge from the Army."

Held, that this provision is applicable to all discharges by purchase issued on and after the date of the approval of the act, irrespective of the time when the soldier enlisted.

(6-310, J. A. G., June 7, 1916.)

ENLISTED MEN: Indebtedness to the United States standing from former enlistment.

The question was presented whether an enlisted man is liable for any indebtedness to the Government contracted during his preceding enlistment.

Held, that the War Department is without authority voluntarily to waive an indebtedness due the United States; that the discharge of an enlisted man indebted to the United States does not *ipso facto* wipe out the indebtedness, and that it would be the duty of the department to cause its collection from pay accruing to him.

(72-510, J. A. G., Apr. 29, 1916.)

GENERAL STAFF CORPS: Boards for recommending officers for detail to.

Section 5 of the national defense act approved June 3, 1916, provides, with reference to the composition of boards required by the act to recommend officers for detail to the General Staff Corps, that—

“Neither the Chief of Staff nor more than two other members of the General Staff Corps, nor any officer not a member of said corps, who shall have been stationed or employed on any duty in or near the District of Columbia within one year prior to the date of convening of any such board, shall be detailed as a member thereof.”

Held, that the service of officers on a board sitting in the District of Columbia which was found after the completion of its report to be illegal was not service in the District within the prohibition of the act, and that they were not therefore by reason of such service ineligible for service on a new board.

(6-210, J. A. G., June 30, 1916.)

GENERAL STAFF CORPS: Increases under national defense act.

With reference to section 5 of the national defense act, relating to the General Staff Corps, questions were submitted and answered as follows:

(a) Does the law with reference to the General Staff go into effect immediately upon the signing of the bill? *Answer:* The law with reference to the General Staff goes into effect immediately upon signing the bill by the President (3 Ops. Atty. Gen., 82), but, as in the case of other increases in the personnel of the Army, the additional offices representing the increase in the personnel of the General Staff Corps do not become effective at once but are added in five annual increments, the first increment being added July 1, 1916, the second July 1, 1917, etc. Unless conditions arise under which the President is authorized to organize the Army immediately, or so much thereof as he may deem necessary, the additional offices representing the increase do not come into being until the periods stated from which the respective increments are to rank—that is, from July 1 of the year in which the increment is added.

(b) What will be the authorized strength of the General Staff after the bill is signed? *Answer:* The authorized strength of the General Staff Corps, after the bill is signed, will be that provided by existing law, until July 1, 1916, when the first increment of the increase is added.

(c) Will the law require the officers of the General Staff in excess of the number authorized for duty in Washington to be immediately relieved and assigned to duty elsewhere? *Answer:* Section 5 of the act provides that:

"Not more than one-half of all the officers detailed in said corps shall at any time be stationed or assigned to or employed upon any duty in or near the District of Columbia, etc."

Held, that this is general law, which became effective upon the signing of the bill.

(d) Does the provision for the details in the General Staff create vacancies as provided in section 27 of the act of February 2, 1901, upon the signing of the bill, or does this part of the bill become effective July 1, due to resulting increase in the officers? Does this increase become effective at once, or in five increments, as provided for other increases? *Answer:* This provision requires that section 27 of the act of February 2, 1901, "shall apply to each position vacated by officers below the grade of general officer detailed in the General Staff Corps. It creates vacancies immediately upon the approval of the act and brings such vacancies under the operation of section 27, *supra*, but such vacancies can not be regarded as within the operation of section 24 of the act which provides that the increases in the commissioned and enlisted personnel of the Army shall be made in five annual increments. I think the provision should be construed as specifically creating vacancies in the positions vacated by the officers comprising the existing General Staff Corps and providing for their being filled under the operation of section 27 of the act of February 2, 1901, and as to future increments to the General Staff Corps, vacancies upon the detail of the officers comprising such increments.

(6-210, J. A. G., May 25, 1916.)

HEAT AND LIGHT ALLOWANCES: Officer sick in hospital when his regiment takes station at another place.

An officer was sick in hospital when his regiment left to take station at another place. He was unable to accompany the regiment and after remaining in the hospital for several weeks was granted sick leave. His family continued to occupy public quarters at the same station, and the question was submitted whether they were entitled to draw the officer's heat and light allowances.

Held, that the orders changing the station of the officer's regiment were necessarily suspended as to such officer until he was able to comply therewith, and that he was entitled to have his heat and light allowance furnished his family under the circumstances stated until the end of his sick leave, which was within the limits prescribed by A. R. 1035.

(72-315, J. A. G., June 23, 1916.)

INSPECTOR GENERAL'S DEPARTMENT: Composition of, under the national defense act.

Section 7 of the national defense act, approved June 3, 1916, provides:

"The Inspector General's Department shall consist of one inspector general with the rank of brigadier general; four inspectors general

with the rank of colonel; eight inspectors general with the rank of lieutenant colonel; and sixteen inspectors general with the rank of major."

Held, that this provision does not repeal the authority contained in the act of June 23, 1874 (18 Stat., 244) to "detail officers of the line, not to exceed four, to act as assistant inspectors general" with pay and allowances as prescribed, which has been regarded by the department as permanent legislation and as not having been repealed by provisions similar to the above section 7 contained in the acts of February 5, 1885 (23 Stat., 297), March 2, 1899 (31 Stat., 701), and February 2, 1901 (31 Stat., 751).

(6-222, J. A. G., June 3, 1916.)

MEDICAL OFFICERS: Provisions of law governing examinations for promotion.

Section 24 of the national defense act, approved June 3, 1916, declares that—

"The provisions of existing law requiring examinations to determine fitness for promotion of officers of the Army are hereby extended to include promotions to all grades below that of brigadier general."

Under existing law there are two courses of action prescribed in respect to medical officers who fail to qualify for promotion for reasons other than physical disability incurred in line of duty—the act of April 23, 1908 (35 Stat., 67), which applies to captains and lieutenants, providing that upon their failure to pass the examination the finding of the examining board shall be passed upon by a board of review, and if it be concurred in by the board of review the officer shall be discharged with one year's pay; the other, the act of March 3, 1909 (35 Stat., 737), which applies in terms to majors, and provides that if such officer fails to pass an examination for promotion, for reasons other than physical disability incurred in line of duty, he shall be suspended from promotion and reexamined after the expiration of one year, and if he then fails to pass he shall be retired without promotion.

Held, that by the above-quoted provision of the national defense act the provisions of the act of March 3, 1909, *supra*, relating to examination of majors of the Medical Corps and the action to be taken in case of failure to qualify for promotion, is extended to include promotions of officers of the Medical Corps above the grade of major and below the grade of brigadier general.

(64-221.4, J. A. G., June 12, 1916.)

NATIONAL GUARD: Appointment of second lieutenants—as to antedating rank.

The question arose in connection with the proposed appointment of two enlisted men of the District of Columbia National Guard as second lieutenants whether they could properly be given rank from the date when the vacancies occurred.

Held, that the rule which applies in the case of promotions of officers by seniority, to give them the rank as from the date the vacancy occurred, does not obtain in respect of appointments of second lieu-

tenants from the ranks, the reason being that an officer promoted by seniority may be deemed to exercise, and in many cases does actually exercise, the duties of the higher grade from the date the vacancy occurred, while an officer appointed from the ranks can not exercise the duties of a second lieutenant until the appointment is made; that therefore the custom of dating rank of a second lieutenant appointed from the ranks from the date the appointment is made, rather than from the date the vacancy occurred, would appear to be sound in principle and should be adhered to.

(82-111, J. A. G., June 8, 1916.)

NATIONAL GUARD: Discharges on account of dependent family.

Section 29 of the national defense act, approved June 3, 1916, contains the following provision:

"When by reason of death or disability of a member of the family of an enlisted man occurring after his enlistment members of his family become dependent upon him for support, he may, in the discretion of the Secretary of War, be discharged from the service of the United States *or be furloughed to the Regular Army Reserve*, upon due proof being made of such condition."

Held, that this provision as a whole is inapplicable to the National Guard, in view of the alternative of furloughing the soldier "to the Regular Army Reserve," and that its terms indicate that it was intended to apply only to the Regular Army.

(58-052, J. A. G., June 1, 1916.)

NATIONAL GUARD: Status as to enlistment, under State law, while in the Federal service.

A member of the National Guard was under enlistment for three years in active service and for five years in the reserve under the State law. Having been called into the Federal service, the question was submitted whether he was entitled to his discharge from the service of the United States at the expiration of his three-year term of active service for which he enlisted, or whether he would be compelled to continue in the service of the United States during his reserve period.

Held, that it is not the effect of the Federal law or proclamation calling the militia into service of the United States to control the term of service with the colors; that the effect of the local law being to transfer the militiaman to and invest him with the reserve status, he could not be kept on continuous active service on and after the expiration of the three-year period for which he enlisted except upon affirmative action taken by the State authorities under the local law to that end. Advised, however, that a bill pending in Congress gives authority to the War Department to subject members of the National Guard to the draft, whether they be on the active or reserve list.

(58-100, J. A. G., June 26, 1916.)

NATIONAL GUARD: Status of the adjutant general of a State, Territory, or District.

The question was presented whether the adjutant general of a State, Territory, or District is an officer of the National Guard within the meaning of the national defense act, approved June 3, 1916, which provides, in section 109, for pay of certain commissioned officers of the National Guard, including *all staff officers*, and in section 110, that the participation in Federal appropriations after a certain time shall be dependent upon the enactment of local law providing that—

“Staff officers, including officers of the Pay, Inspection, Subsistence, and Medical Departments, hereafter appointed shall have had previous military experience,” etc.

And further in section 66 that—

“The adjutants general of the States, Territories, and the District of Columbia *and the officers of the National Guard* shall make such returns and reports to the Secretary of War, or to such officers as he may designate, at such times and in such form as the Secretary of War may from time to time prescribe * * *.”

Held, that in providing for the organization of the National Guard as a Federal force Congress has recognized the duties of the several States, and has required or relied upon their cooperation; that the adjutant general is an official whom the act contemplates the State will provide and maintain in the performance of its duties; and that it recognizes the adjutant general of a State as a State official only and not as an officer of the National Guard.

(58-210, J. A. G., June 9, 1916.)

OFFICERS: Recommissioning of persons formerly in the service.

Section 24 of the national-defense act contains the following provision:

“The President may recommission persons who have heretofore held commissions in the Regular Army and have left the service honorably, after ascertaining that they are qualified for service physically, morally, and as to age and military fitness; such recommissioned officers shall take rank at the foot of the respective grades which they held at the time of their separation from the Army.”

Held, that this provision creates no new office, and that a former officer can only be recommissioned thereunder to fill an existing vacancy. (64-213.2, J. A. G., June 20, 1916.) *Held, further*, that this provision relates exclusively to persons who are not a part of the Army and does not apply to officers on the retired list. (88-110, J. A. G., May 27, 1916.) Also held, that one who prior to the passage of the national defense act had honorably resigned from the Medical Corps while a captain may, though he be over 30 years of age, be recommissioned (that is, reappointed) in said corps under the above provisions of section 24 of that act, without regard to the requirement of section 10 thereof that persons hereafter commissioned in the Medical Corps shall be between the ages of 22 and 30 years; the latter provision, in respect of age at least, being applicable to original appointments as first lieutenants in said corps.

(64-213.2, J. A. G., June 12, 1916.)

OFFICERS: Recommissioning of persons formerly in the service.

A former captain of the Army applied for recommission as a captain under section 24 of the national-defense act, which provides—

"The President may recommission persons who have heretofore held commissions in the Regular Army and have left the service honorably, after ascertaining that they are qualified for service physically, morally, and as to age and military fitness; such recommissioned officers shall take rank at the foot of the respective grades which they held at the time of their separation from the Army."

While under a penitentiary sentence of a State court for a felony, and upon his application, he was permitted to resign. The act of January 19, 1911 (36 Stat., 894), was then in force, which provided—

"That the President be, and he is hereby, authorized to drop from the rolls of the Army any officer who is absent from duty three months without leave, or who has been absent in confinement in a prison or penitentiary for more than three months after final conviction by a civil court of competent jurisdiction; and no officer so dropped shall be eligible for reappointment."

Held, that the applicant, although his resignation as tendered and accepted was in terms unconditional, the character of the discharge was nevertheless governed by the actual conditions which at the time required his expulsion from the Army without honor, and that the form of his discharge did not render his leaving the service honorably within the meaning of section 24 of the national defense act.

(28-214, J. A. G., June 22, 1916.)

PAY AND ALLOWANCES: Rate of pay of aviation mechanic while on furlough.

The act of July 18, 1914 (38 Stat., 514), relating to the aviation section of the Signal Corps, provides that—

"Each aviation enlisted man * * * while holding the rating of aviation mechanic, shall receive an increase of fifty per centum in his pay."

Held, that aviation enlisted men holding the rating of aviation mechanic are entitled to the increase of pay while on furlough.

(72-241, J. A. G., June 23, 1916.)

PAY CLERKS: Change of status under the national defense act.

Section 9 of the national defense act, approved June 3, 1916, enumerates the officers who shall comprise the Quartermaster Corps, and includes—

"the pay clerks *now in active service, who shall hereafter have* the rank, pay, and allowances of a second lieutenant, and the President is hereby authorized to appoint and commission them, by and with the advice and consent of the Senate, second lieutenants in the Quartermaster Corps, United States Army."

In reference to this provision questions were submitted and answered as follows:

(a) Will the status of pay clerks change automatically in accordance with the above law; and if so, on what date? *Answer*: The legislation speaks from the date of the approval of the statute—June 3, 1916—automatically giving them the rank, pay, and allow-

ances prescribed therein as of that date. They do not, however, become commissioned officers of the Quartermaster Corps until acceptance of their commissions after confirmation by the Senate.

(b) When their status as to rank, pay, and allowances changes, does such change also involve necessarily assignment to different duties from those heretofore performed by them? *Answer:* No. The legislation does not contemplate any necessary assignment to different duties from those heretofore performed by these pay clerks, but after becoming commissioned officers they may be charged with additional duties and responsibilities involved in such change in their status.

(6-224, J. A. G., June 13, 1916.)

POST EXCHANGE: Loss of funds through negligence of post exchange officers.

The field safe at a post exchange was robbed at night, resulting in the loss of \$127.64 in cash belonging to the exchange. The post exchange officer did not take personal charge of the cash accruing from the preceding day's business, but left it with the exchange steward, who locked it in the field safe "according to custom," to be turned over to the post exchange officer the next morning.

The post exchange regulations (Par. 3, G. O. No. 176, War Dept., 1909) provide that:

"The exchange officer is in charge of the exchange and is responsible for its management. * * * As custodian of funds belonging to enlisted men he should attend to all cash transactions in person"—and this regulation has been viewed by the War Department as requiring that the post exchange officer "*should at the close of each day's business check up the steward's daily report of cash and coupons received, and after verification enter these data in the cash book, as well as all other transactions involving cash receipts and expenditures, and deposit the cash on hand in his safe.*" (Par. 1075, "A Guide for Inspectors General, 1911.")

Held, that by reason of his failure to take personal charge of the funds at the end of the day's business and properly secure them, the post exchange officer became responsible for the loss.

(72-517, J. A. G., May 25, 1916.)

PRIVATE PROPERTY: Disposition of ammunition taken from private citizens under martial law.

In connection with the Colorado strike troubles in 1914 Federal troops, under martial law, collected a lot of miscellaneous ammunition from citizens. In view of the practical difficulty of assorting and returning such ammunition to the owners after the cessation of the disturbances it was proposed to sell all of it, including that for which claim had been made, and to deposit the proceeds in the Treasury of the United States.

Held, that the owners of the ammunition were entitled to its return to them and that it could not be sold or otherwise disposed of except in accordance with the directions of the owners; provided, however, that as to such portion thereof for which no claim may be made

within a reasonable time it should be treated as abandoned property in the hands of the Government and sold as such and the proceeds deposited in the Treasury as miscellaneous receipts. As to what should be considered a reasonable time, it was suggested that the local statute of limitations in actions for detaining goods or chattels be accepted and observed as a reasonable measure of time within which claims should be submitted.

(18-451, J. A. G., May 24, 1916.)

PUBLIC MONEYS: Receipts from sale of worn-out prison clothing, etc.

At one of the military prisons a "prison improvement fund" was maintained in part by proceeds from the sale of worn-out clothing, which had been issued to prisoners, and miscellaneous junk. Section 3618, Revised Statutes, requires that all proceeds of sales of old material, condemned stores, supplies, or other public property of any kind shall, with certain exceptions not presently material, be deposited and covered into the Treasury as miscellaneous receipts and not withdrawn except by authority of a subsequent appropriation.

Held, that the old clothing and junk in question being public property of the United States, the proceeds from their sale are required by Revised Statutes 3618 to be deposited in the Treasury as miscellaneous receipts.

(78-110, J. A. G., May 12, 1916.)

RETIREMENT: As to change of officer's retirement status.

An officer requested "a change of status from 'retired on own application' to retirement for disability incident to service." He stated various facts as evidence of disability prior to his retirement, indicating that had a retiring board been convened he would have been retired for incapacity incident to the service.

Retirement for disability incident to service can be effected only through the operation of a retiring board under sections 1246-1251, Revised Statutes.

Held, that the retirement of an officer under a particular statute exhausts the power of the President and the record of executive action can not be revoked or modified so as to make retirement relate to another statute, even though the case were one to which more than one statute properly applied at the time retirement was accomplished; and further, that the statutes relating to retirement apply only to officers on the active list; that there is no authority for the restoration of a retired officer to the active list for the purpose of being again retired; and that, therefore, the request in the instant case could not be granted.

(88-120, J. A. G., June 28, 1916.)

SIGNAL CORPS: Composition of, under the national defense act.

The first paragraph of section 13 of the recent national defense act reads as follows:

"The Signal Corps shall consist of one Chief Signal Officer, with the rank of brigadier general; three colonels; eight lieutenant colo-

nels; ten majors; thirty captains; seventy-five first lieutenants; and the aviation section, which shall consist of one colonel; one lieutenant colonel; eight majors; twenty-four captains; *and one hundred and fourteen first lieutenants, who* shall be selected from among officers of the Army at large of corresponding grades or from among officers of the grade below, exclusive of those serving by detail in staff corps or departments, *who are qualified as military aviators*, and shall be detailed to serve as aviation officers for periods of four years unless sooner relieved; and the provisions of section twenty-seven of the act of Congress approved February second, nineteen hundred and one, are hereby extended to apply to said aviation officers and to vacancies created in any arm, corps, or department of the Army by the detail of said officers therefrom; but nothing in said act or in any other law now in force shall be held to prevent the detail or redetail at any time, to fill a vacancy among the aviation officers authorized by this act, of any officer who, during prior service as an aviation officer of the aviation section, shall have become proficient in military aviation."

With reference to the above provision, questions were submitted and answered as follows:

(a) To what does the word "who" following the words "one hundred and fourteen first lieutenants" relate—to the Signal Corps and aviation section combined, or only to the latter? *Answer:* It refers only to the aviation section.

(b) To what class of officers does the phrase "who are qualified as military aviators" relate? *Answer:* Only to the officers selected from "the grade below."

(c) Can officers serving by detail in staff corps or departments who are not qualified as military aviators be detailed in the aviation section? *Answer:* Officers serving by detail in the staff corps or departments who are not qualified as military aviators may be detailed in the aviation section, provided it be *in the corresponding grade*, but they may not be detailed to the grade above.

(6-228, J. A. G., May 27, 1916.)

TAXATION: Chauffeur's license for Government employees.

A chauffeur in the employ of the Federal Government in the Philippine Islands operating an automobile owned by the Government and used exclusively in the performance of the business of the Federal Government was called upon by the territorial authorities to pay a chauffeur's license tax.

Held, that the demand was illegal, as it is definitely settled that the instrumentalities of the Federal Government are not subject to taxation or the police regulations of local governments.

(90-125, J. A. G., June 20, 1916.)

TRANSPORTATION: Allowance to general prisoner on discharge.

In the case of a general prisoner at the United States Disciplinary Barracks under sentence of dishonorable discharge, the question arose as to whether he was entitled to be furnished transportation

upon his discharge to the Canal Zone, the place of his last enlistment. The current Army appropriation act, approved March 4, 1915, under the heading "Transportation of the Army and its supplies," provides for transportation of persons on their discharge from the United States Disciplinary Barracks, or from any place in which they have been held under a sentence of dishonorable discharge and confinement for more than six months, or from the Government Hospital for the Insane after transfer thereto from such barracks or place, "to their homes (or elsewhere as they may elect), provided the cost in each case shall not be greater than to the place of last enlistment."

Held, that under the rule that all laws in *pari materia* should be construed together, the above provision should be read in connection with the general law on the subject of transportation for discharged enlisted men, contained in the act of August 24, 1912 (37 Stat., 576), by which the authority is limited to furnishing transportation to points within the continental limits of the United States, and that therefore the prisoner in question would not be entitled upon his discharge to transportation to any point outside of the continental limits of the United States.

(94-300, J. A. G., June 20, 1916.)

VETERINARIANS: Composition of first board of examiners under the national defense act.

Section 16 of the national defense act relating to the appointment of the present veterinarians as "assistant veterinarians" or "veterinarians" in the new Veterinary Corps established by that act, contains the following provision:

"The Secretary of War shall from time to time appoint boards of examiners to conduct the veterinary examinations hereinbefore prescribed, each of said boards to consist of three medical officers and two *veterinarians*."

The question arose as to how the *first* veterinary examining boards shall be constituted prior to the issuing of commissions to any persons in the new Veterinary Corps, in view of the requirement that two members of such boards shall be "veterinarians."

Held, that as the law does not specifically require the veterinarian members of the board to have qualified under the examination provided by the national defense act, and it would be impossible so to constitute the first board, the existing veterinarians in the service should be appointed members of the first boards convened for the required examinations.

(6-133, J. A. G., June 6, 1916.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

CLAIMS: Personal property loss or damage, evidence required by accounting officers.

An officer submitted a claim under the provisions of the act of March 3, 1885 (23 Stat., 350), as extended by the act of March 4,

1915 (38 Stat., 1077), for damages to personal baggage in transit. The comptroller affirmed the auditor's disallowance on the ground of lack of sufficient evidence.

Held, that the evidence submitted to the accounting officers of the Treasury in support of a claim for reimbursement under the act of March 3, 1885, as extended, for personal baggage of an officer or enlisted man of the Army lost or damaged in changing station should consist of as complete a statement of facts as possible relative to the value of the property and the circumstances attending its loss or damage, and not merely of the conclusions of a board of officers as to such loss or damage, which conclusions are in no way binding on the accounting officers; that in the consideration of claims of this class the opinions or conclusions of the board are entitled to some weight, but the accounting officers of the Treasury are not by such opinions and conclusions relieved of the duty of reaching their own conclusions or in any manner bound by such opinions or conclusions, and that if possible a clear and minutely detailed description of the damage to each article for which compensation is claimed, as well as the market value of the article at time of crating or packing for shipment, and all facts obtainable as to when, where, and under what circumstances the damage sustained should be given.

(Comp. W. W. Warwick, May 16, 1916.)

ENLISTED MEN: Pay of privates, Medical Department, under the new national defense act.

By section 10 of the national defense act it is provided that—

"The enlisted men of the Hospital Corps who are in active service at the time of the approval of this act are hereby transferred to the corresponding grades of the Medical Department established by this act.

Section 28 provides:

"Hereafter the monthly pay of enlisted men of certain grades of the Army created in this act shall be as follows, namely: * * * private, Medical Department, * * * fifteen dollars. Nothing herein contained shall operate to reduce the pay or allowances now authorized by law for any grade of enlisted men of the Army."

Held, that by reason of the saving clause in section 28, that "nothing herein contained shall operate to reduce the pay or allowances now authorized by law for any grade of enlisted men of the Army," privates of the Medical Department transferred to that grade from the Medical Corps by operation of section 10 are entitled to be paid at the rate of \$16 per month during the remainder of their current enlistment.

Held further, that the pay of men enlisting in the grade of private, Medical Department, on or after June 3, 1916, will be at the rate of \$15 per month, and also that privates of other branches of the military service whose pay is \$15 per month who are transferred to the grade of private, Medical Department, upon their own application or with their consent, will be paid upon the basis of the new rate of \$15 per month.

(Acting Comp. C. M. Foree, June 19, 1916.)

ENLISTED MEN: Pay of mess sergeants.

By sections 11, 17, 18, 19, and 20 of the national defense act of June 3, 1916, the grade of mess sergeant for organizations of the Engineer Corps, the Infantry, the Cavalry, and for the Field and Coast Artillery of the Army, was created. Pay was fixed by section 28, as follows:

"Hereafter the monthly pay of enlisted men of certain grades of the Army created in this act shall be as follows: * * * mess sergeant * * * Corps of Engineers * * * \$36; * * * mess sergeant, Infantry, Cavalry, and Artillery, * * * \$30; * * * Nothing herein contained shall operate to reduce the pay or allowances now authorized by law for any grade of enlisted men of the Army."

Heretofore enlisted men have served as mess sergeants by *detail* under paragraph 1346, A. R., 1913, and were paid extra compensation under the act of May 11, 1908 (35 Stat., 159), which provided that mess sergeants shall receive \$6 per month in addition to their pay.

Held, that the act of June 3, 1916, created the grade of mess sergeant for certain arms of the service only; that for other arms of the service mess sergeants must be provided as heretofore by detail; that the men holding the grade of mess sergeant under the new act are entitled only to the pay established for that grade, namely, \$36 or \$30 per month, according to the arm of the service in which serving, and that men *detailed* as mess sergeants in the arms of the service for which the grade of mess sergeant is not provided are entitled to the pay of the grades actually held by them plus \$6 per month, as provided in the act of May 11, 1908; and further, in answer to specific questions,

Held, that—

(a) The base or initial pay of the grade of mess sergeant, Corps of Engineers, is \$36 per month, and no more.

(b) The base or initial pay of the grade of mess sergeant in the Infantry, Cavalry, and Artillery is \$30 per month, and no more.

(c) The continuous-service pay of persons appointed to the grade of mess sergeant should be computed on the basis of the rates mentioned in the answers to questions (a) and (b).

(d) The arms of the service for which the act of June 3, 1916, makes provision for mess sergeants are not entitled to have additional mess sergeants assigned or detailed thereto. Such provision is complete as to such organizations.

(Comp. W. W. Warwick, June 30, 1916.)

LEAVE OF ABSENCE: Officers and employees of the Government who are members of the National Guard called into the service of the United States.

Section 80 of the national defense act, approved June 3, 1916, reads as follows—

"*Leaves of absence for certain Government employees.*—All officers and employees of the United States and of the District of Columbia who shall be members of the National Guard shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be

engaged in field or coast-defense training ordered or authorized under the provisions of this act."

With reference to this provision, the following questions were submitted:

(1) "Can employees of the department who are members of the National Guard and have been called out by order of the President, be paid their salaries as employees of the department for such time as they remain in camp and are not drafted into the active military service of the Government?"

(2) "Can any such employees be borne on the rolls of the department in a pay status after they have been drafted into active military service of the Government?"

(3) "Can employees, where they are paid from lump fund appropriations, be carried on the rolls of the Treasury Department in a non-pay status after they have been drafted into the active military service of the Government?"

(4) "Does the provision of this section take effect on date of its approval or on June 1, 1916?"

Held, in answer to questions (1) and (2), that the leave authorized in favor of officers and employees who are members of the National Guard being only for the time while they are "engaged in field or coast-defense training" ordered or authorized under the provisions of that act, it is not available to such officers and employees when called into the service of the United States by the President. Advised, however, that while the employees referred to are not entitled to military leave under the said provision, there appears to be no reason why they should not be paid their regular salaries as officers or employees for such period prior to their actual muster into the service as would be covered by annual leave granted to them in accordance with law, and that even if actually mustered into the service of the United States, *enlisted men* may continue to receive pay as officers or employees until the expiration of the leave granted, provided the combined pay of the military and civil positions does not exceed \$2,000 per annum. If it does exceed \$2,000, payment of any compensation as a civilian officer or employee would be prohibited under the provisions of section 6 of the act of May 10, 1916 (Pub. No. 73). This applies to men called forth under the provisions of section 4 of the act of January 21, 1903, as amended, as well as those drafted into the military service under the provisions of section 111 of the act of June 3, 1916.

Held, that question (3) being purely administrative and not involving any payment to be made, the comptroller was without jurisdiction to decide it.

Held, as to question (4), that the section referred to became effective June 3, 1916, the date of approval.

(Comp. W. W. Warwick, June 28, 1916.)

PAY AND ALLOWANCES: Foreign service pay for trips into Mexico.

In the case of certain officers and enlisted men connected with the punitive expedition into Mexico who had temporary station at Columbus, N. Mex., and made trips into Mexico, *held*, that they were entitled to foreign service pay for the time served in Mexico on the trips.

(Comp. W. W. Warwick, June 26, 1916.)

PAY AND ALLOWANCES: Persons drawing two salaries.

By section 6 of the legislative, etc., appropriation act of May 10, 1916, it is provided as follows:

"That unless otherwise specially authorized by law no money appropriated by this or any other act shall be available for payment to any person receiving more than one salary when the combined amount of said salaries exceeds the sum of \$2,000 per annum, but this shall not apply to retired officers of the Army, Navy, or Marine Corps whenever they may be appointed or elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate or to officers and enlisted men of the Organized Militia and Naval Militia in the several States, Territories, and the District of Columbia."

Held, that in the case of a retired enlisted man of the Army his pay as such is not salary within the meaning of the above statute, also that a pension is not a salary within its inhibition.

(Comp. W. W. Warwick, June 3, 1916.)

TRANSPORTATION: Apportionment of charges in shipment of excess baggage.

In the shipment of an officer's change of station effects, there was included in the car with the household goods one of the officer's mounts shipped at public expense. The baggage weighed 6,007 pounds. The horse weighed 1,100 pounds, but was charged for on the basis of 5,000 pounds as provided by the official classification. The rate on the basis of less than carload was 35 cents per hundredweight for the 11,007 pounds charged for. The carload rate being 30 cents per hundredweight for a minimum of 12,000 pounds, the latter was accepted as being in the Government's favor and there being chargeable against the officer the cost on 3,509 pounds of excess baggage, the question was presented as to the proper basis for determining the apportionment.

Held, that "the question for determination is whether in apportioning the cost of the shipment between the officer and the Government the weight of the horse is to be considered as 5,000 pounds constructive weight or 1,100 pounds actual weight. It must be borne in mind that 5,000 pounds is not the weight of the horse, but is merely stated as the basis for determining the charge for its transportation when the less-than-carload rate is applicable. This constructive basis for determining the charge for transportation does not affect the actual weight, which is clearly distinguishable therefrom. The weight of the horse being 1,100 pounds and the other portion of the shipment 6,007 pounds, makes a total weight of 7,107 pounds, for which the cost is on the basis of a carload of 12,000 pounds as the maximum charge for the shipment, which would cost more if less-than-carload rates were applied. The officer should pay such proportion of this \$36 as his excess of 3,509 pounds bears to the total weight of 7,107 pounds, for which the said charge is made."

(Comp. W. W. Warwick, May 19, 1916.)

TRAVEL ALLOWANCES: Enlisted men on discharge.

Section 126 of the national defense act, approved June 3, 1916, provides:

"On and after July first, nineteen hundred and sixteen, an enlisted man when discharged from the service, except by way of punishment for an offense, shall receive $3\frac{1}{2}$ cents per mile from the place of his discharge to the place of his acceptance for enlistment, enrollment, or original muster into the service, at his option: *Provided*, That for sea travel on discharge transportation and subsistence only shall be furnished to enlisted men."

By section 128 it is provided "that all laws or parts of laws in so far as they are inconsistent with this act are hereby repealed."

In view of these provisions of the national defense act the following questions were submitted for decision:

(a) Will the travel pay of enlisted men on discharge on and after July 1, 1916, be governed by the acts of June 12, 1906, and June 3, 1916?

(b) Does the act of June 3, 1916, confer upon an enlisted man on discharge a right to travel pay to a place other than the place of his acceptance for enlistment?

Held, that the act of August 24, 1912 (37 Stat., 575), providing for transportation and subsistence in kind for enlisted men on their discharge, or, in lieu thereof, 2 cents a mile, at the election of the soldier, was repealed by the act of June 3, 1916, and that on and after July 1, 1916, the payment of travel pay to enlisted men of the Army on discharge will be governed by the acts of June 12, 1906 (34 Stat., 247), and June 3, 1916. The act of June 12, 1906, referred to provides:

"For the purpose of determining allowances for all travel under orders, or for officers and enlisted men on discharge, travel in the Philippine Archipelago, the Hawaiian Archipelago, the home waters of the United States, and between the United States and Alaska shall not be regarded as sea travel and shall be paid for at rates established by law for land travel within the boundaries of the United States."

Question (a) accordingly answered in the affirmative.

Held, as to question (b) that the language "at his option" in section 126 of the national defense act has operation only with reference to the preceding words "enrollment" or "original muster into the service"; that as these terms are not properly applicable to enlisted men of the Regular Army, such enlisted men on discharge are entitled to travel allowances only to the place of their acceptance for enlistment, i.e., the place of initial acceptance, it being the purpose of the act to return a man to the place from which he was taken by the Government. As to enlisted men of volunteer or militia organizations to which the terms "enrollment" or "muster into the service" may apply, they may exercise an option. If a man enters the military service as a part of a recognized organization which has been enrolled for the purpose of becoming a part of the Army, and such organization is mustered into the service at a different place from that where the members were enrolled, he may, upon discharge or muster out, be allowed travel to the place of his enrollment or to the place of his muster in, as he may elect, or, in the language of the statute "at his option." Answering question (b) specifically, an enlisted man of the Regular Army is entitled to travel pay only to the place of his acceptance for enlistment.

(Comp. W. W. Warwick, June 26, 1916.)

BULLETIN 28.

BULLETIN }
No. 28. }

WAR DEPARTMENT,
WASHINGTON, August 18, 1916.

The following digest of opinions of the Judge Advocate General of the Army for the month of July, 1916 (one opinion printed in full), and of certain decisions of the Comptroller of the Treasury and of a court, is published for the information of the service in general.

[2255370 L—A. G. O.]

By ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Major General, Chief of Staff.

OFFICIAL:

H. P. McCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

JULY 29, 1916.

MEMORANDUM for the Secretary of War.

Subject: Status of members of the National Guard under the call for Federal service.

1. The views of this office are desired with respect to the questions raised in the accompanying letter by the Hon. J. Hampton Moore, M. C., with respect to the status of members of the National Guard now in the service of the United States. The questions submitted by Mr. Moore are as follows:

(a) "Is the National Guard, as at present mustered in by officers of the Regular Army under the oath required by the national defense act (the Hay bill), in the jurisdiction of the States, subject to orders from the governors, or is it now a part of the Regular Army of the United States in the pay of the United States Government and subject to the Regular Army term of service? An answer to this inquiry might include the further question as to the pensionable status of members of the National Guard as now sworn in for service along the Mexican border.

(b) "If the National Guard as at present in service along the Mexican border has not been drafted under existing law, including the Dick Act and the national defense act, it is available for service under the Constitution beyond the borders of the United States? An answer to this question may include the statement of the effect of the resolution of Congress declaring an emergency to exist."

2. In answering these questions the term "Organized Militia" will be applied to the militia organized under the act of January 21, 1903, known as the "Dick bill" (32 Stat., 775), as amended, and the term "National Guard" will be applied to the members of

the Organized Militia who have qualified under the national defense act of June 3, 1916, by subscribing the oath and enlistment contract as provided in sections 70 and 73 of that act.

3. The Organized Militia of the States of Arizona, New Mexico, and Texas have been mustered into the service under the call of May 9, 1916, and the Organized Militia and National Guard of the other States are in the service under the call issued by the President June 18, 1916, both calls being for the purpose of protecting the United States against aggression from Mexico.

4. The questions submitted will be answered first with respect to the Organized Militia of the States of Arizona, New Mexico, and Texas. These were mustered into the service of the United States under section 7 of the Dick bill, the officers and enlisted men taking in connection with the said muster the oath prescribed by the muster-in regulations promulgated under that law. Their status is that of militia called into the service of the United States for one of the purposes specified in the Constitution, that is, to protect the United States against invasion. While in such service, they are subject to the laws and regulations governing the Regular Army, so far as applicable to their temporary status, and are subject only to the orders of the President. They are not, while in such service, under the jurisdiction of the States, nor are they subject to the orders of the governors, whose authority over them for the time being is suspended, except only with respect to the appointment of officers. They are not a part of the Regular Army of the United States, nor are they subject to the Regular Army term of service. They are in the service *as militia* called forth to meet the exigency for which the call was issued. While in the service they are, of course, in the pay of the United States Government and are entitled to the same pay and allowances as the regular troops. With regard to their pensionable status, section 22 of the Dick bill gives them the benefit of the pension laws for any disability incurred in the service and, in case of death, confers on the widow or children of the deceased all the benefits of such pension laws. Under the decision of the comptroller of July 20, 1916, the widow or beneficiary of a member of the Organized Militia dying in the service, in line of duty and not as the result of his own misconduct, is entitled to the six months' gratuity pay, the same as in the case of officers or soldiers of the Regular Army.

5. Answering the questions submitted with respect to the Organized Militia and National Guard who are in the service under the call of June 18, 1916, it should be observed that shortly after the passage of the national defense act of June 3, 1916, the Organized Militia of the several States began to transform themselves into the National Guard of the new national defense act. The call of June 18, 1916, found this process of transformation going on, and it was necessary, therefore, for that call to embrace both the Organized Militia and the National Guard, if it were to be effective to call into the service of the United States all of the militia forces, and it was so drafted.

6. With respect to those organizations of the Organized Militia that had transformed themselves, prior to June 18, 1916, into the National Guard under said act, no muster in was necessary, as it was the effect of the call to place them in the service of the United States from the date they were required by the terms of the call to

respond thereto (sec. 101, national defense act). The muster-in rolls of the several organizations are on file in the War Department, but this office has not had an opportunity to give them any detailed examination. It is understood, however, that pursuant to instructions the members of the Organized Militia who had not qualified under the national defense act were required to be mustered in, taking the prescribed muster-in oath; but as to those who had so qualified, their names were entered upon the muster rolls with a notation to the effect that they had already taken the oath prescribed in sections 70 and 73 of the national defense act.

7. There are, therefore, in the service of the United States under the call of June 18, 1916, two classes of militia—one the militia organized under the Dick bill and the other the National Guard as organized under the national defense act. With respect to those who have not qualified under the national defense act, their status is identical with that of the Organized Militia of the States of Arizona, New Mexico, and Texas, which is discussed above. The status of those who have qualified under the national defense act is that of National Guard "called as such into the service of the United States" (sec. 101, national defense act), and they are, while in such service, "subject to the laws and regulations governing the Regular Army," so far as applicable to their temporary status, and are subject only to the orders of the President. They are not, while in such service, under the jurisdiction of the State, nor are they subject to the orders of the governor, whose authority over them for the time being is suspended, except only with respect to the appointment of officers within the classes specified in the national defense act of June 3, 1916. They are not a part of the Regular Army of the United States, nor are they subject to the Regular Army term of service. Like the Organized Militia, whose status is discussed above, their status in the service under the call is that of militia called into the service of the United States for one of the purposes specified in the Constitution—that is, to protect the United States against invasion. They are, of course, in the pay of the United States Government and are entitled while in the service to the same pay and allowances as regular troops. In fact, both classes of troops, while in the service of the United States, are subject to the laws and regulations governing the Regular Army, so far as applicable to their temporary status, and subject only to the orders of the President. Neither class of troops, while in such service, is under the jurisdiction of a State or subject to the orders of a governor, whose only authority with respect to them is, as above stated, to appoint officers to any vacancies which may occur. Both classes of the militia are entitled to pensions for disabilities incurred during their period of service, under the same conditions as are regular troops; and their beneficiaries are also entitled, under the decision of the comptroller of July 20, 1916, to the six months' gratuity pay in the case of their death while in the service from wounds or disease "not the result of their own misconduct."

8. Much of the misconception that has arisen regarding the status of the National Guard in service under the call of June 18, 1916, appears to rest on the assumption that it is the effect of the new oath and enlistment contract, and the call of that date, to make

the National Guard available for any service for which the Regular Army may be used during the period of service under the call. But that Congress did not so intend is evident from the fact that the act of June 3, 1916, contains a provision (sec. 101) applicable to the National Guard "when called *as such* into the service of the United States" and a distinct provision (sec. 111) for drafting them into the Federal service, applicable only "when Congress shall have authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those of the Regular Army." As to persons so drafted, it is distinctly provided that they "shall, from the date of their draft, stand discharged from the militia, and shall from said date be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Volunteer Army * * * ." It is clear, I think, that the national defense act contemplates that the National Guard shall be available for service, either as National Guard called into the service of the United States *as such* for the three constitutional purposes or, when specially authorized by Congress, as a *national force* supplementing the Regular Army and available for any service for which regular troops may be used. In other words, the national defense act gives the Government the right, in return for the expenditure for pay, training, and equipment of the National Guard, to draft them into the Federal service to supplement the Regular Army, but this right can be exercised only when Congress shall have authorized its exercise, as has been done in the joint resolution of July 1, 1916.

9. With regard to the effect of the declaration in the joint resolution of July 1, 1916, that an emergency exists, I think there can be no question but that this declaration serves as the reason for conferring the authority to make the draft and also as a limitation upon the authority with regard to the term of service under the draft. It is provided therein that the draft shall be "*for the period of the emergency*, not exceeding three years, unless sooner discharged." The resolution confers a discretion on the President to issue the draft or not, as the exigencies of the situation may require.

E. H. CROWDER,
Judge Advocate General.

AVIATION SERVICE: Increase in personnel.

Anticipating a possible shortage of flyers to meet the emergency on the Mexican border, the Chief Signal Officer submitted the following questions, to which are subjoined the answers given:

(a) May qualified fliers from the militia or from civil life be appointed and commissioned reserve officers and assigned as reserve officers to the aviation section of the Signal Corps? *Answer:* Section 37 of the national defense act authorizes the creation of an Officers' Reserve Corps to include, *inter alia*, "sections corresponding to the various arms, staff corps, and departments of the Regular Army." Qualified fliers from the militia or from civil life may be appointed and commissioned as reserve officers in the Officers' Reserve Corps, and in time of "actual or threatened hostilities" they may be assigned to duty with the aviation section of the Signal Corps, as authorized by section 38 of that act.

(b) What number of reserve officers may be assigned to the aviation section of the Signal Corps on July 1? *Answer:* The number depends on the number of divisions organized and on the number of regular officers and aviators available for duty with the aero squadrons authorized for the divisions which may be organized.

(c) May fliers be appointed "aviators" and be subsequently appointed and commissioned in the Officers' Reserve Corps? *Answer:* Section 13 of the national defense act provides for the appointment and commissioning of civilians to the grade of aviator created by said act, with the base pay of \$150 per month and with the allowances "of a master signal electrician and the same percentage of increase in pay for length of service as is allowed to a master signal electrician." The statute broadly authorizes the commissioning of the number required to make up the shortage of Army officers to fill the places allowed by law for the aviation section, such aviators being given an indefinite tenure, subject only to the provision that "whenever any aviator shall have become unsatisfactory he shall be discharged from the Army as such aviator."

I see no reason why an aviator may not resign and be subsequently appointed and commissioned in the Officers' Reserve Corps; but I see no object to be accomplished in commissioning an aviator, while in the service as such, as an officer in the Officers' Reserve Corps.

(d) May militia officers who are qualified fliers be detached from their commands and assigned to flying duty in the aviation section of the Signal Corps? *Answer:* When the militia are called into the service of the United States, no reason is perceived why qualified fliers of the same may not be detached from their commands and assigned to flying duty in the aviation section of the Signal Corps in the same manner as may other officers in the service of the United States, but subject to any limitations on their use incident to their status as Organized Militia.

(6-301, J. A. G., July 10, 1916.)

DESERTERS: Payment of reward for arrest of deserting militiamen or national guardsmen.

The question was presented whether a reward is payable for arrest of deserting members of the Organized Militia or National Guard inducted into the service of the United States. The Army appropriation act, in the item for incidental expenses, provides:

"For the apprehension, securing, and delivering of deserters, including escaped military prisoners, and the expense incident to their pursuit, and no greater sum than \$50 for each deserter or escaped military prisoner shall, in the discretion of the Secretary of War, be paid to any civil officer or citizen for such service and expenses."

Held, that none of the provisions of law or regulations on the subject makes any distinction between deserters from the Regular Army and others, and that as the members of the National Guard and Organized Militia, while in the service of the United States, are subject to the same laws and regulations as regular troops, it follows that the payment of rewards for their arrest as deserters is authorized.

(26-200, J. A. G., July 31, 1916.)

ENLISTED MEN: Continuous-service pay.

An enlisted man of the Regular Army whose discharge was authorized to enable him to accept a commission in the National Guard, in the service of the United States, inquired whether he would lose his continuous-service pay status by accepting such commission. The act of May 11, 1908 (35 Stat., 105), provides for continuous-service pay to those reenlisting within three months after their honorable discharge.

Held, that there exists no exception to the requirement that reenlistment must occur within three months from the soldier's discharge to entitle him to continuous-service pay.

(34-225, J. A. G., July 3, 1916.)

ENLISTED MEN: Detail of noncommissioned officers for service in National Guard.

Section 36 of the national defense act authorizes the Secretary of War to detail "sergeants" for the purpose of "assisting in the instruction of the personnel and care of property in the hands of the National Guard."

Held, that the purpose of the act being to provide for the detail of competent men for the purposes mentioned, the word "sergeants" should be construed in its broader sense so as to include the detail of sergeants, first class, in the few cases where, on account of the technical knowledge required, the instruction of the Signal Corps of the National Guard can be properly given only by such sergeants.

(6-156, J. A. G., July 18, 1916.)

ENLISTED MEN: Discharge because of dependent family.

Section 29 of the national defense act contains the following provision:

"That when by reason of death or disability of a member of the family of an enlisted man occurring after his enlistment members of his family become dependent upon him for support, he may, in the discretion of the Secretary of War, be discharged from the service of the United States or be furloughed to the Regular Army Reserve upon due proof being made of such condition."

Held, that this provision repeals section 30 of the act of February 2, 1901 (31 Stat., 756), which authorized the discharge only upon the death of a dependent parent and after one year's service.

(6-310, J. A. G., July 28, 1916.)

ENLISTED MEN: Rates of pay.

Section 19 of the national defense act of June 3, 1916, in the part prescribing the composition of a gun or howitzer battery of Field Artillery, contains the following provision:

"When no enlisted men of the Quartermaster Corps are attached for such positions there shall be added to each battery of mountain

artillery one packmaster (sergeant, first class), one assistant packmaster (sergeant), and one cargador (corporal)."

No rate of pay is prescribed by statute for a sergeant, first class, of Field Artillery, but the three grades of enlisted men mentioned, viz, sergeant, first class, sergeant, and corporal, are provided for in the Quartermaster Corps at rates of \$45, \$36, and \$24, respectively.

Held, that it is clearly the intent of the statute that said rates in the Quartermaster Corps shall apply to enlisted men occupying the positions of packmaster, assistant packmaster, and cargador, respectively, whether the men are assigned from the Quartermaster Corps or are "added" as provided by the act.

(72-200, J. A. G., July 8, 1916.)

EXAMINATIONS: Matters to be considered in determining general efficiency of officer.

Held, that an examining board in determining the general efficiency of an officer for promotion may consider (1) the use the officer has made of his opportunities, (2) his ability to apply practically his professional knowledge, (3) his general trustworthiness and ability in the performance of his official duties, and (4) his ability to command troops or control men.

(64-221.3, J. A. G., July 12, 1916.)

GENERAL STAFF CORPS: Number of officers authorized to be on duty in District of Columbia.

Section 5 of the national defense act relating to the General Staff Corps specifies the grades and number of officers thereof, all of whom shall be detailed therein for periods of four years, unless sooner relieved, and further, that "not more than one-half of all of the officers detailed in said corps shall at any time be stationed or assigned to or employed upon any duty in or near the District of Columbia."

Held, that general officers detailed to the General Staff Corps must be regarded as part of the one-half of the officers of the corps permitted to be assigned to or employed on duty in or near the District of Columbia.

(6-211, J. A. G., July 25, 1916.)

NATIONAL GUARD: Detail of officers of, to duty with the Regular Army.

Held, that there is no legal objection to detaching officers or organizations of the National Guard and Organized Militia inducted into the military service of the United States under the calls of May 9 and June 18, 1916, and detailing them to duty with corresponding organizations of the Regular Army.

(58-251, J. A. G., July 20, 1916.)

NATIONAL GUARD: Discharge of members by State authorities after the President's call.

After the receipt of the President's order of June 18, 1916, calling the Organized Militia into the service of the United States, discharges were issued to certain enlisted men by order of the governor of a State upon personal pleas by relatives and friends of the enlisted men. Other discharges were issued by organization commanders to men who were considered undesirable or physically unfit for the service.

Held, that after the receipt by a governor of the President's call he was unauthorized to order the discharge of enlisted men, and that the Federal authority alone can relieve the men from their obligation.

(58-052, J. A. G., July 17, 1916.)

NATIONAL GUARD: Discharge of officers and enlisted men for physical disability.

Section 115 of the national defense act provides that:

"Every officer and enlisted man of the National Guard who shall be called into the service of the United States as such shall be examined as to his physical fitness under such regulations as the President may prescribe without further commission or enlistment."

In connection with the induction of the National Guard into the service of the United States under the President's call of June 18, 1916, the question arose whether those officers and enlisted men found physically unfit for service should be discharged from both the Federal service and the National Guard.

Held as follows: Under the national defense act the National Guard occupies a dual status, i. e., as a national force and also as a State force, and no officer or enlisted man can remain a member unless he is physically qualified for Federal service. Congress has prescribed the qualifications for commission or enlistment in the National Guard and has asserted, on behalf of the United States, the authority to prescribe the conditions under which enlistments and discharges in and from the National Guard shall be made. Section 72 of the national defense act restricts discharges in time of peace, so that no discharge may be given in time of peace "prior to the expiration of terms of enlistment" except "under such regulations as the President may prescribe." Section 115 provides for a medical examination to determine the physical condition of the officers and enlisted men when called into the service of the United States, and it appears clear that an officer or enlisted man, upon being examined as required in that section and found physically defective, must be discharged not only from the operation of the call into the Federal service, but also from the National Guard. In the case of an enlisted man the discharge, when ordered, should be effected by a discharge in writing, signed by the proper National Guard commander, under the provisions of section 72 of the national defense act, and should be so worded as to show that it is a discharge not only from the operation of the Federal call, but also from the National Guard. With respect to a commissioned officer, a discharge should be ordered by the President and should purport to be a discharge from the National Guard.

(28-210, J. A. G., July 18, 1916.)

NATIONAL GUARD: Inspectors of small-arms practice.

An opinion was requested respecting the status of inspectors of small-arms practice under the national defense act. Section 3 of the militia act of January 21, 1903, as amended May 27, 1908 (35 Stat., 399), providing for the organization, armament, and discipline of the Organized Militia in conformity with that prescribed for the Regular Army, contained a proviso authorizing inspectors of small-arms practice for divisions, brigades, regiments, etc. Section 60 of the national defense act reenacts the requirements as to conformity to the organization prescribed for the Regular Army, omitting the said proviso, in the following language:

"Except as otherwise *specifically provided herein*, the organization of the National Guard, including the composition of all units thereof, shall be the same as that which is or may hereafter be prescribed for the Regular Army, subject in time of peace to such general exceptions as may be authorized by the Secretary of War."

Held, in view of the omission of the proviso and the express language that the requirements as to conformity shall apply "except as otherwise specifically provided herein," that no inspector of small-arms practice is authorized for the National Guard, there being no specific authority for such inspectors elsewhere in the national defense act.

(58-210, J. A. G., July 12, 1916.)

NATIONAL GUARD: Members of, who are officers or employees of the Government; as to leaves of absence, etc.

Section 80 of the national defense act provides:

"All officers and employees of the United States and of the District of Columbia who shall be members of the National Guard shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be engaged in field or coast-defense training ordered or authorized under the provisions of this act."

With reference to this provision, questions were submitted and answered as follows:

(a) What constitutes "field or coast-defense training ordered or authorized under the provisions of this act?" *Answer:* The field or coast-defense training contemplated is that prescribed in section 92, that each organization of the National Guard "shall participate in encampments, maneuvers, or other exercises, including outdoor target practice, at least fifteen days in training each year" and again referred to in section 94 providing for the participation of National Guard troops in "encampments, maneuvers, or other exercises, including target practice for field or coast-defense instruction, either independently or in conjunction with a part of the Regular Army."

(b) What appropriation should be charged to cover the pay of the employees during their absence on the training above mentioned? *Answer:* From the appropriations from which they are paid at the time they take such leaves.

(c) Is the authorized absence with pay in addition to, or to be deducted from, that authorized in the leave act of February 1, 1901?

Answer: The two statutes constitute separate authorities for leaves of absence with pay. The leaves authorized by section 80 of the national defense act are additional to those authorized by the act of February 1, 1901.

(d) Do the provisions apply to the absence of a Federal employee by direction of the governor of a State for the purpose of complying with the following provisions of section 92 of the national defense act, "and shall, in addition thereto, participate in encampments, maneuvers, or other exercises, including outdoor target practice, at least fifteen days in training each year"? *Answer:* Yes. The training is to be carried out by the several States. See section 91.

(e) Do the exemptions of section 59 from militia duty prohibit the exempted persons from performing militia duty? *Answer:* That such exemption may be waived by the individual is evident from section 80 providing for leaves of absence of all officers of the United States who shall be members of the National Guard.

(f) If optional, are those exempted by section 59 entitled to the benefits of section 80 of the national defense act providing for leaves of absence? *Answer:* Yes. The fact that the service is optional does not deprive the person of leaves of absence authorized by section 80.

(g) Do the terms "artificers and workmen" as employed in section 59 comprise "all employees at arsenals," or are there excepted classes such as those performing clerical, designing, or supervising duties? *Answer:* The word "workmen" is one of broad meaning. Whether it includes those performing clerical, designing, or supervising duties, I deem it unnecessary to determine. I am informed that all persons performing clerical, designing, or supervising duties in arsenals are in the civil service of the United States. They are, therefore, executive officers of the United States and are exempted under section 59 whether they be included in the term "workmen" or not. Section 59 by exempting executive officers of the Government of the United States and artificers and workmen in the armories and arsenals includes within its provisions, I think, all persons employed at such armories or arsenals.

(16-407, J. A. G., July 14, 1916.)

NATIONAL GUARD: Minors under 18 not eligible for enlistment.

The question was presented whether a minor under 18 years of age may, with the consent of his parents or guardian, legally be enlisted in the National Guard. Section 58 of the national defense act provides:

"The National Guard shall consist of the regularly enlisted militia between the ages of eighteen and forty-five years organized, armed, and equipped as hereinafter provided, and of commissioned officers between the ages of twenty-one and sixty-four years."

Held, that this provision is controlling and limits the ages for qualification as therein specified, and that the provisions in section 27 relating to the ages for enlistment or muster in have no application to the National Guard.

(34-110, J. A. G., July 7, 1916.)

NATIONAL GUARD: Passing of enlisted men to National Guard Reserve while in the Federal service.

Enlisted men of the Organized Militia who qualify as national guardsmen under sections 69 and 70 of the national defense act of June 3, 1916, respecting the oath and contract of enlistment, become bound thereby for six years' service, three years in the "active organization and the remaining three years in the National Guard reserve," credit being given for the "period already served under the old enlistment contract."

Held, that those members so qualified who are in the active service of the United States under the President's call of June 18, 1916, which call did not include the National Guard reserve, are entitled to be mustered out of the active service at the end of their active enlistment period of three years for the purpose of taking their place in the National Guard reserve, and that they can not be held for further active service against their will, but that they have the *privilege*, under section 69 of the national defense act, of continuing in the active service during the whole of the enlistment period; and *further*, that they may, with the concurrence of the War Department, elect to continue in active service for such portion of the remaining three years during which the National Guard shall remain in active Federal service.

(58-052, J. A. G., July 26, 1916.)

NATIONAL GUARD: Telegraph service at Government rates.

The question was presented whether telegrams sent by the adjutant general of a State in pursuance of the President's orders calling out the National Guard should be paid for at Government rates. The Government rates provided for by section 5266, Revised Statutes, apply to messages sent by "officers and agents" of the Government of the United States on official business.

Held, that the adjutant general of a State who sends telegrams in pursuance of the President's orders calling out the National Guard acts as an agent of the Federal Government within the purview of the statute, as the execution of such orders is wholly the business of the Government of the United States, and that such telegrams should be paid for from Federal appropriations at Government rates and not the regular commercial rates.

(22-050, J. A. G., July 17, 1916.)

NATIONAL GUARD: Waiver of exemption from military duty.

With reference to section 59 of the national defense act of June 3, 1916, providing for the exemption of certain classes of persons from militia duty.

Held, that the exemptions are personal and may be waived, and that a person who waives his exemption by enlisting in the National Guard can not thereafter during the enlistment avail himself of it.

(58-052, J. A. G., July 3, 1916.)

OFFICERS: Appointment of persons not citizens of the United States.

The pending Army appropriation bill contains the provision that—

“No part of the appropriation made in this act shall be available for the salary or pay of any person hereafter, in time of peace, appointed an officer in the Army, who is not a citizen of the United States.”

Held, that this does not repeal the provisions of existing law authorizing the appointment of native Filipinos as officers of Philippine Scouts, and of native citizens of Porto Rico as officers in the Porto Rico regiment.

(6-260, J. A. G., July 3, 1916.)

OFFICERS: Promotions in Quartermaster Corps.

The new national-defense act provides for certain increases of officers in the Quartermaster Corps but prescribes no rule for filling the vacancies.

Held, that the new positions created belong to the Quartermaster Corps as a whole, and the rule prescribed by the act of August 3, 1912 (37 Stat., 591), in connection with the reorganization of that corps, is not applicable, and that the vacancies are required to be filled according to the general rule of seniority prescribed in section 1 of the act of October 1, 1890 (26 Stat., 563).

(6-224, J. A. G., July 3, 1916.)

OFFICERS: Scope of examination for appointment.

Section 16 of the national-defense act approved June 3, 1916, relating to the appointment of veterinarians, contains the proviso—

“That no such appointment of any veterinarian shall be made unless he shall first pass satisfactorily a practical professional examination as to his fitness for the military service.”

Held, that as the act limits the character of the examination to a practical professional and physical examination, it excludes a theoretical examination, and the examination required must be confined to such inquiry as will determine the ability of the applicant skillfully to perform his profession, but may include a written examination on questions of a practical nature.

(64-221.4, J. A. G., July 1, 1916.)

OFFICERS' RESERVE CORPS: Number of officers authorized in various grades.

Section 37 of the national defense act contains the following provision:

“*Provided*, That the proportion of officers in any section of the Officers' Reserve Corps shall not exceed the proportion for the same grade in the corresponding arm, corps, or department of the Regular Army, except that the number commissioned in the lowest authorized grade in any section of the Officers' Reserve Corps shall not be limited.”

Inquiry was made whether the maximum number that may be commissioned in each grade of the quartermaster section is limited and, if so, what the maximum number may be in each grade except the lowest.

Held, that this provision does not limit the number who may be commissioned in any grade above the lowest, except by the proportion which the number in that grade in the corresponding arm, corps, or department of the Regular Army bears to the number in other grades in that arm, corps, or department, and that the number that may be commissioned is unlimited so long as the proportion between grades, except as to any maximum number for the lowest, is maintained in the same manner as established for the grades of the corresponding arm, corps, or department of the Regular Army.

(6-224, J. A. G., July 7, 1916.)

RETIRED OFFICER: Commission in National Guard.

A retired officer inquired whether it would prejudice his Regular Army status to accept a commission as an officer in the National Guard. (Sec. 74, national defense act.)

Held, that the status of retired officers will not be impaired by active service under a National Guard commission. During their service as National Guard officers in the active service of the United States they will receive only the pay of their National Guard offices.

(88-542.1, J. A. G., July 7, 1916.)

RETIRED OFFICERS: Question as to pay and allowances when assigned to active duty.

The last sentence of section 24 of the national defense act concludes as follows:

"And provided further, That hereafter any retired officer who has been or shall be detailed on active duty shall receive the rank, pay, and allowances of a grade not above that of major that he would have attained in due course of promotion if he had remained on the active list for a period beyond the date of his retirement equal to the total amount of time during which he has been detailed on active duty since his retirement."

With reference to this provision, questions were submitted and answered as follows:

(a) "Is a retired officer detailed at an institution of learning on full-pay status considered as *on active duty* within the meaning of section 24, last sentence, of the new act of Congress?" *Answer*: Yes. Section 45 of said act prescribes that the officers so detailed shall receive "the full pay and allowances of their grade," if the officer be not above the grade of major, and if above that grade the "same pay and allowances as a retired major would receive under the like detail." While service on college duty has not been expressly designated by statute as *active duty*, Congress has authorized the detail of active officers on such duty, and I think where the law under which the detail of a retired officer is made provides that while on

such duty he shall receive the full pay of his grade, service under such detail must be regarded as service "on active duty" within the meaning of section 24 of the national defense act, above quoted.

(b) "What of retired officers detailed under the act of 1904?"

Answer: With respect to a retired officer detailed to an educational institution under the act of April 21, 1904 (32 Stat. 255), I think the question should be answered in the negative. That statute authorized the detail to the particular duty under conditions that the detail should be made with the officer's consent, and that the officer so detailed should receive no compensation from the Government other than his retired pay—it being contemplated that the institution should supplement his pay and provide allowances by way of additional compensation. I think it is clear that an officer detailed under this act was not regarded as detailed on active duty, and is not to be regarded as having been "on active duty within the meaning of section 24, last sentence," of the national defense act.

(c) "Will an officer detailed under section 45 of the same act be considered as on active duty under section 24?" *Answer:* This question is already answered under (a).

(d) "Will a retired officer detailed under section 56 of the same act be considered as on active duty under section 24? Will he be entitled to full pay and allowances?" *Answer:* Section 56 does not expressly authorize the detail of retired officers or noncommissioned officers to the schools and colleges specified therein, but confers authority for the detail of "such commissioned and noncommissioned officers of the Army to said schools and colleges." I think that this section only confers authority for the detail of officers and noncommissioned officers on the active list, and that the authority for the detail of retired officers and noncommissioned officers to such schools and colleges must be found in other statutes.

(88-620, J. A. G., July 25, 1916.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

ARMY RESERVE: Continuous-service pay.

The following questions were submitted for decision:

"(a) Whether an enlisted man who has been transferred to the Army reserve may be discharged from the reserve and reenlisted before the expiration of his existing seven-year term upon being called to the colors in time of war."

"(b) Whether time spent in the Army reserve, not with the colors, is to be counted in computing continuous-service pay."

Held, that both the acts of August 24, 1912 (37 Stat., 590), and June 3, 1916 (Public No. 85, 64th Cong.), provide that an enlisted man furloughed to the Army reserve is not entitled to be discharged and reenlisted until the expiration of his seven-year term of enlistment. Question (a) answered in the negative.

Held, as to question (b), that the acts of August 24, 1912, and June 3, 1916, contemplate four and three years, respectively, of active

service, and not service in the reserve, in making up an enlistment period for the purpose of computing continuous-service pay, and that, therefore, time spent in the Army reserve, not with the colors, can not be counted in computing continuous-service pay.

(Comp. Treas., June 23, 1916.)

CADETS: Burial expenses.

In the case of a cadet, United States Military Academy, who died at Rock Island Arsenal, Ill., request was made for funds for the payment of bill for services rendered in furnishing casket and preparing the remains for shipment.

Held, that the expenses were not payable from the funds appropriated by the sundry civil appropriation act for the disposition of the "remains of officers, including acting assistant surgeons, and enlisted men of the Army active list * * *" for the reason that the cadets are neither officers, acting assistant surgeons, nor enlisted men of the Army active list, and *further*, that such expenses could not be paid from the appropriation for contingencies of the Army or any other existing appropriation for the Military Establishment.

(Comp. Treas., July 28, 1916.)

CLAIMS: Damages caused by tort of Government employee.

A post laundry delivery automobile collided with a privately owned vehicle, resulting in \$18.25 damage to the latter, the evidence tending to show that the collision was due to the fault or negligence of the driver of the laundry wagon. The question was presented whether the funds of the post laundry were available for the payment of the claim.

Held, that the post laundry, being a Government plant, and the driver of the delivery automobile being a Government employee, the case came within the well-established rule that damages caused by the negligence or torts of the officers or agents of the Government, or arising from unavoidable accident, do not constitute claims against the United States which the accounting officers can allow or pay.

(Comp. Treas., June 30, 1916.)

COMPENSATION: Computation of pay for services other than personal.

In making payments for the hire of teams used in river and harbor work during a 31-day month the disbursing officer computed the compensation on the basis of 30 days to the month. *Held*, that the act of June 30, 1906, 34 Stat., 763 (see also par. 651, Army Regulations), is confined to the computation of compensation of officers, agents, and employees of the United States for personal service, and has no application to a case like the one under consideration, for the hire of a wagon and team.

(Comp. Treas., June 29, 1916.)

ENLISTED MEN: Reduction of grades under the national defense act.

With reference to decreases in the number of enlisted men of different grades provided by the national defense act and of the applicability thereto of the provision in section 28 of that act that "nothing herein contained shall operate to reduce the pay or allowances now authorized by law for any grade of enlisted man of the Army—

Held, that this provision relates to the pay of *grades* and not of individuals, and that demotion of individual soldiers, if found necessary to be made in order to comply with the law providing for a reduction in the members of grades in any particular line of the Army, is not a reduction of pay or allowances fixed by law for such grades, and hence would not be prohibited by this provision.

(Comp. Treas., July 19, 1916.)

MEDICAL CORPS: Computing length of service of dental surgeons.

A decision was requested whether in computing, under the provisions of section 10 of the national defense act, the length of service of dental surgeons, for promotion and other purposes, all such dental surgeons as had service as contract or acting dental surgeons prior to June 3, 1916, if otherwise eligible, should be given credit for the length of their service as such contract or acting dental surgeons, in addition to credit for service as first lieutenants, under the act of March 3, 1911 (36 Stat., 1054). Section 10 of the national defense act, authorizing the appointment of dental surgeons as commissioned officers, provides, *inter alia*:

"Dental surgeons shall have the rank, pay, and allowances of first lieutenants until they have completed eight years' service. Dental surgeons of more than eight but less than twenty-four years' service shall, subject to such examination as the President may prescribe, have the rank, pay, and allowances of captains. Dental surgeons of more than twenty-four years' service shall, subject to such examination as the President may prescribe, have the rank, pay, and allowances of major."

The act of March 3, 1911, contains the provision that—

"Acting dental surgeons who have served three years in a manner satisfactory to the Secretary of War shall be eligible for appointment as dental surgeons, and after passing in a satisfactory manner an examination which may be prescribed by the Secretary of War may be commissioned with the rank of first lieutenant in the Dental Corps to fill the vacancies existing therein;" and also contains a provision—

"That the time served by dental surgeons as acting dental or contract dental surgeons shall be reckoned in computing the increased service pay of such as are commissioned under this act."

Held, that the provision quoted from the act of 1911 was not repealed by the national defense act, and that the two provisions should be read together; that the term "years' service" as used in the act of June 3, 1916, includes service under contract as well as service under commission, and is limited to service as a *dental surgeon* under contract or commission; and that therefore, in computing under said law the length of service of dental surgeons, for promotion and

other purposes, all such dental surgeons as are otherwise eligible and have service as contract dental surgeons or acting dental surgeons prior to June 3, 1916, shall be given credit for the length of their service as such contract dental surgeons or acting dental surgeons, in addition to credit for service as first lieutenant under the act of March 3, 1911.

(Comp. Treas., July 22, 1916.)

NATIONAL GUARD: Additional pay of enlisted men qualifying as gunners.

The question was presented whether enlisted men of the Field Artillery of the Militia or National Guard in the service of the United States are entitled to additional pay as gunners under qualifications attained prior to being called into the Federal service, their examinations having been conducted in accordance with the requirements for the Regular Army.

Held, that inasmuch as the requirements for qualifications as gunners are the same for the enlisted men of the Field Artillery of the militia or National Guard as for the enlisted men of the Regular Army, and as the laws relating to pay give the militia, when called into the service of the United States, the same pay and allowances as are or may be provided by law for the Regular Army, they are entitled to the additional pay as gunners under their qualifications attained prior to their being called into the service of the United States, subject to the conditions imposed by paragraph 1344, Army Regulations.

(Comp. Treas., July 21, 1916.)

NATIONAL GUARD: Laws providing for death gratuities applicable to.

The question was presented whether officers and enlisted men of the Organized Militia or National Guard called or drafted into the service of the United States are entitled to the benefit of the laws authorizing the payment of so-called death gratuities. (Act of May 11, 1908, 35 Stat., 108, as amended Mar. 3, 1909, 35 Stat., 735.)

Held, that any part of the Organized Militia or National Guard brought into the service of the United States as provided by law becomes a part of the Army of the United States, and the officers and enlisted men thereof are as effectually in the military service of the United States as are any of the officers and enlisted men of the Regular Army, and that they are entitled to the benefits of the statutes under consideration providing for death gratuities.

(Comp. Treas., July 20, 1916.)

RETIRED OFFICERS: Longevity pay for active service in time of war.

The question was presented whether the following provision in section 24 of the national defense act of June 3, 1916, authorized longevity-pay increases:

"That in time of war retired officers of the Army may be employed on active duty in the discretion of the President, and when so em-

ployed they shall receive the full pay and allowances of their grade: *And provided further*, That hereafter any retired officer who has been or shall be detailed on active duty shall receive the rank, pay, and allowances of the grade, not above that of major, that he would have attained in due course of promotion if he had remained on the active list for a period beyond the date of his retirement equal to the total amount of time during which he has been detailed on active duty since his retirement."

The act of March 2, 1903 (32 Stat., 932), provides:

"That hereafter, except in case of officers retired on account of wounds received in battle, no officer now on the retired list shall be allowed or paid any further increase of longevity pay, and officers hereafter retired, except as herein provided, shall not be allowed or paid any further increase of longevity pay above that which had accrued at date of their retirement."

Held, that the act of June 3, 1916, does not expressly, or by necessary implication, repeal or modify any part of the act of March 2, 1903, and that as the latter act expressly provides that time after retirement shall not be counted for longevity purposes, officers coming within the provision in question of the act of June 3, 1916, are not entitled to any higher pay in the grade that they would have attained in due course of promotion if they had remained on the active list than the pay of such higher grade computed on the length of their service at the time of their retirement.

(Comp. Treas., July 28, 1916.)

COURT DECISION.

(Digest prepared in the office of the Judge Advocate General.)

NATURALIZATION: Alien enlisted men furloughed to Army Reserve.

Section 2166, Revised Statutes, provides that any alien of the age of 21 years and upward, who has enlisted or may enlist in the armies of the United States and has been honorably discharged, shall be admitted to become a citizen upon his petition without any previous declaration of intention. The fourth article of war declares that no discharge shall be given to any enlisted man before his term of service is expired except by order of the President, Secretary of War, the commanding general of a department, or by sentence of court-martial. An enlisted man (alien) who, after three years' active service, had been furloughed to the Army Reserve, filed an application for naturalization under section 2166, Revised Statutes.

Held, that his certificate of furlough was not an honorable discharge entitling him to apply for citizenship under section 2166, Revised Statutes.

(In re *Markun*, 232 Fed., 1018.)

BULLETIN 34.

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No. 34. }

WAR DEPARTMENT,
WASHINGTON, September 12, 1916.

The following digest of opinions of the Judge Advocate General of the Army for the month of August, 1916, and of certain decisions of the Comptroller of the Treasury and of a court, is published for the information of the service in general.

[2458489, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Major General, Chief of Staff.

OFFICIAL:

H. P. McCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ARMY ORGANIZATION: Enlisted men for brigade headquarters.

Section 3 of the National Defense Act contains the provision that "Nothing herein contained, however, shall prevent the President * * * from prescribing new and different organizations and personnel as the efficiency of the service may require."

Held, that in the organization of brigade headquarters the above provision would not authorize the creation of any grade not known to the law, such as a suggested brigade sergeant major, but that the President in the organization of brigade, division, or Army corps headquarters may employ such enlisted men in the grades and within the numerical limits authorized by law, in addition to those required for organizations, as he may determine to be necessary for the purpose, and may, therefore, include in the organization of a brigade headquarters as a part thereof and not detailed from any organization a sergeant major with the rank, pay, and allowances of whatever grade of sergeant major he may designate; *and further*, that he may also include in the organization of a brigade headquarters as personnel thereof and not pertaining to any other organization, such enlisted men of other grades authorized by law as he may deem necessary.

(6-237, J. A. G., Aug. 2, 1916.)

ARMY RESERVE: Organization of.

Section 31 of the National Defense Act authorizes the President "to assign members of the Regular Army Reserve as reserves to particular organizations of the Regular Army, or to organize the Regular Army Reserve, or any part thereof, into units or detach-

ments of any arm, corps, or department in such manner as he may prescribe," and, in the event of actual or threatened hostilities, to "mobilize the Regular Army Reserve in such manner as he may determine, and thereafter retain it, or any part thereof, in active service for such period as he may determine the conditions demand."

Held, that the law contemplates that the President may cause reservists to be organized at all times in the manner indicated and that, in the discretion of the President, they may be attached, as such, to organizations of the Regular Army that are at maximum strength, but when so attached they are not constituent parts of such organizations, and form no part of the numbers authorized by law for such organizations.

(6-300, J. A. G., Aug. 23, 1916.)

ARMY RESERVE: Physical disability of members called to the colors.

In the case of a member of the Regular Army Reserve called to the colors it was found that he was afflicted with a venereal disease contracted after he was furloughed to the reserve. He having been accepted as "physically fit for service" upon reporting for duty, except for this disability requiring only temporary hospital treatment, the question was presented whether his absence from duty while in the hospital on this account came within the purview of the act of August 24, 1912 (37 Stat., 572), providing for deduction from the pay of an officer or enlisted man for time absent from duty on account of disease resulting from his own misconduct, etc. (G. O. 31, W. D., 1912).

Held, that when the reservist was accepted upon reporting for duty he was in active service, and thereupon became subject to the statute referred to; that the disease he had is regarded as a disease proscribed by that act, and that as it was incurred during his current enlistment, which was entered into subsequent to the passage of that act, he was not entitled to pay for the time he was absent from duty on account of such disease.

(6-300, J. A. G., Aug. 29, 1916.)

CONTRACTS: Questions arising out of the default of contractor; appropriations.

A contractor for furnishing Quartermaster supplies defaulted and, in accordance with the provisions of the contract, the Government purchased the required supplies in the open market at an excess cost of \$800.36. The amount retained from payment to the contractor was only \$64, and the surety bond was in the penal sum of \$500.

Held, that demand could be made upon the surety for only \$500, which, when collected, should be deposited to the credit of the appropriation for the supplies, and not deposited as miscellaneous receipts (18 Comp. Dec., 430), and that the \$64 should remain in the appropriation for the supplies. *Advised* that if the surety refused to pay the amount of the penalty on demand the facts should be reported to the Attorney General with a view to the enforcement of the demand by judicial proceedings.

(76-742, J. A. G., Aug. 11, 1916.)

CONTRACTS: Unforeseen conditions not within the contemplation of the parties.

After certain contracts were made for furnishing hay and bedding for troops in the Southern Department for the fiscal year 1917, which specified the probable quantities of material which would be required to meet the needs of the service and the limits within which the quantities might be increased or decreased, the Organized Militia and National Guard were called out for duty in that department, which resulted in a greatly increased demand for hay and bedding. Calls were made upon the contractors in the five weeks beginning July 1, 1916, to deliver more than one-half of the quantity specified in the contracts for the entire year.

Held, that the contracts were entered into under conditions which contemplated that only the usual number of troops of the Regular Army would be stationed in the Southern Department, and that the contracts should receive execution in accordance with such understanding of the parties; that, therefore, calls should be made under the contract for deliveries based upon the conditions contemplated, and purchases required to meet the needs of the service due to the calling out of the militia troops should be made by supplemental contracts or purchases in the open market.

(76-700, J. A. G., Aug. 16, 1916.)

DENTAL SURGEONS: Relative rank under National Defense Act.

The act of March 3, 1911, prescribed the following rule for the determination of the rank of officers of the Dental Corps: "Officers of the Dental Corps shall have rank in such corps according to the date of their commission therein, and shall rank next below officers of the Medical Reserve Corps." Section 10 of the National Defense Act creates the grades of first lieutenant, captain, and major in the Dental Corps.

Held, that the latter provision repealed the former, and that the relative rank of dental surgeons is to be determined by paragraphs 9 and 11, Army Regulations, 1913.

(82-212, J. A. G., Aug. 19, 1916.)

ENLISTED MEN: Abolishment of grade of farrier.

The question was presented whether a farrier of a Cavalry organization at the time the National Defense Act went into effect should be continued as a private or be appointed to any grade "in which eligible and fit."

Held, that the National Defense Act by not including farriers in the composition prescribed for Cavalry units abolished that grade with the result that enlisted men holding the grade of farrier reverted to the grade of private and will continue to serve as such unless they are appointed to some grade authorized by the National Defense Act.

(6-242, J. A. G., Aug. 4, 1916.)

MEDICAL CORPS: Increase of officers in.

Section 24 of the National Defense Act declares that—"Except as otherwise specifically provided by this act, the increases in the commissioned and enlisted personnel of the Regular Army provided by this act shall be made in five annual increments, each of which shall be, in each grade of each arm, corps, and department, as nearly as practicable, one-fifth of the total increase authorized for each arm, corps, and department." Section 10 fixes the number of officers of the Medical Corps at approximately seven for each one thousand enlisted men.

Held, that the prescribed ratio of seven officers to each one thousand enlisted men for the Medical Corps did not become effective with the passage of the act of June 3, 1916, but that the total authorized increase of officers in said corps, to be determined according to the total authorized enlisted strength, including all increments, is subject to the provision in section 24 requiring the increases to be made in five approximately equal increments.

(6-227, J. A. G., Aug. 19, 1916.)

NATIONAL GUARD: Authority of governor to accept officer's resignation.

The question was presented whether the governor of a State has the power to accept the resignation of an officer of the National Guard who is in the service of the United States under a Federal call. Section 77 of the National Defense Act provides, *inter alia*, that—

"Commissions of officers of the National Guard may be vacated upon *resignation*, absence without leave for three months, upon the recommendation of an efficiency board, or pursuant to sentence of a court-martial. * * *

Held, that Congress, by the National Defense Act, having assumed control respecting the qualifications of officers and enlisted men of the National Guard, and respecting the continuity of their service therein, it clearly appears to be the purpose of the statute that even in time of peace the assent of the War Department is required to the separation of an officer from the National Guard by resignation, and *a fortiori* where the officer is in the service under a Federal call.

(58-241, J. A. G., July 28, 1916.)

NATIONAL GUARD: Effect of discharge of members by the United States.

The question was presented whether National Guardsmen in the active service of the United States and discharged therefrom on account of dependent families, may be retained in the National Guard service at their home station.

Held, as follows:

"The National Defense Act, under which the National Guard is organized, prescribes for enlisted men a dual oath involving responsibility both to the State in the National Guard of which they are enlisted and to the United States. One of the effects of the National Defense Act is to require that the enlisted men thereof must be qualified for the service of the United States as well as for the service of

the State and be bound by the terms of their oaths of enlistment to the service of each in order to be recognized as a member of the National Guard. I think it is plain that when the National Guard so organized is in the service of the United States the general government may legally determine when members thereof shall be discharged therefrom. When it has been determined that, for any cause, an enlisted man shall be discharged and a discharge has been issued, the enlisted man so discharged is released from his obligation to the United States by that action, and, since he is no longer obligated to the United States under the terms of his oath, he does not meet the requirements for recognition as a member of the National Guard. Therefore he cannot continue as a member of the National Guard, one of the requirements for membership therein being that he shall be under the obligation of an oath to serve the United States."

(28-223, J. A. G., Aug. 25, 1916.)

NATIONAL GUARD: Increase of pay for aviation service.

The question was presented whether officers and enlisted men of militia organizations brought into the service of the United States are entitled, while on duty requiring them to participate regularly and frequently in aerial flights, to increase of pay for such service, the same as provided by statute for officers and enlisted men of the Regular Army.

Held, that while the Aviation Section of the Signal Corps, provided for in section 16 of the National Defense Act, is prescribed for the Regular Army only, and officers and enlisted men of the National Guard are not eligible for detail to fill places therein, and while there is no corresponding Signal Corps or Aviation Section prescribed for the National Guard, there may be Aviation Squadrons, or unit parts thereof, in the National Guard of the several States as component parts of the "complete higher tactical units" contemplated by section 60, *idem*, and the officers and enlisted men therein will, when duly qualified, be entitled while in the actual service of the United States, or while attending encampments or maneuvers ordered by the Secretary of War, to the same pay and allowances as officers and enlisted men of corresponding grades of the Regular Army receive, including increase of pay while on duty requiring them to participate regularly and frequently in aerial flights.

(58-211, J. A. G., Aug. 25, 1916.)

NATIONAL GUARD: Original appointments of officers to advanced grade.

The question was presented whether the governor of a State can make an original appointment of a person to the grade of captain or major in the medical corps of the National Guard, or whether such office must be filled by promotion from a lower grade in conformity with the rules governing appointments in the Regular Army. Section 60 of the National Defense Act contains the following provision, which is substantially a reenactment of a similar provision in section 3 of the Militia Act of 1903, as amended:

"Except as otherwise specifically provided herein, the organization of the National Guard, including the composition of all units thereof, shall be the same as that which is or may hereafter be prescribed for the Regular Army, subject in time of peace to such general exceptions as may be authorized by the Secretary of War."

Held, that the conformity of organization of the National Guard to the Regular Army required by the statute does not relate to the qualifications of officers for appointment or promotion; that the matter of appointment or promotion in the National Guard rests primarily with the governor of the State, subject to the rules prescribed in section 74 of the National Defense Act relating to the classes of persons from which National Guard officers shall be appointed, and in section 75, relating to examinations to determine qualifications, and that, therefore, an original appointment to the grade of major may, subject to the restrictions mentioned, be made by the governor without regard to the previous service of the appointee; but that inasmuch as the office of captain in the Medical Corps has no existence independent of the person qualified by a period of service to fill it, appointees to that grade in the Medical Corps of the National Guard must have served as first lieutenants for the period fixed by law.

(58-241, J. A. G., Aug. 14, 1916.)

OFFICERS' RESERVE CORPS: Organizational questions.

The second paragraph of section 37 of the National Defense Act authorizes the President to appoint and commission as reserve officers in the various sections of the Officers' Reserve Corps, in all grades up to and including that of major, such citizens as shall, upon examination, be found qualified to hold such commissions,

"*Provided*, That the proportion of officers in any section of the Officers' Reserve Corps shall not exceed the proportion for the same grade in the corresponding arm, corps, or department of the Regular Army, except that the number commissioned in the lowest authorized grade in any section of the Officers' Reserve Corps shall not be limited."

Held, that there are no organizational grades in the Veterinary Corps nor in the Dental Corps and that, therefore, veterinarians can be appointed in the Officers' Reserve Corps only as assistant veterinarians with the rank of second lieutenant, and dental surgeons may be appointed therein only as first lieutenant, and that in neither case can the officer attain a higher rank except through active service for the time prescribed for the attainment of higher rank.

Held further, that as to the Medical Department, the three corps: Medical, Dental, and Veterinary, are to be regarded as separate and distinct corps, for the purpose of determining the proportionate number of officers to be commissioned in the Officers' Reserve Corps; and that the proportion of the grades in the Medical Section proper of the Officers' Reserve Corps should be determined by the proportion which the number in the corresponding grades in the Medical Corps of the Regular Army bear to the total number of officers in the Medical Corps of the Regular Army, the grades of captain and first lieutenant

in the Medical Corps of the Regular Army being considered one grade, that of first lieutenant, in making the computation; and that the appointments to the dental and veterinary sections of the Officers' Reserve Corps, being only to the lowest in each, will be unlimited in that grade.

Held further, that for purposes of appointment in the Officers' Reserve Corps the lowest authorized grade in the Quartermaster Corps is that of captain, to which grade in the Officers' Reserve Corps appointments may be unlimited.

Held further, that the Signal Corps proper and the Aviation Section each constitutes a corps which should form the basis of an organization in the Officers' Reserve Corps, the lowest grade in the Signal Corps being that of first lieutenant. As to the Aviation Section, *held*, that the grade of aviator, provided for in section 13 of the National Defense Act, was created as a means of meeting contingencies and supplying casual deficiencies, and should be regarded as temporary and not as a permanent grade or integral part of the Aviation Section, such as should be made a basis for appointments in the Officers' Reserve Corps, but the lowest grade of the Aviation Section in which an unlimited number of officers may be appointed is that of first lieutenant.

(6-301, J. A. G., Aug. 29, 1916.)

VETERINARIANS: Appointments under the National Defense Act.

Section 16 of the National Defense Act authorizes the appointment of "such veterinarians of the Quartermaster Corps as are now employed in said corps" as commissioned officers, with rank, pay, and allowances according to length of service as specified therein.

Held, that those persons employed as inspectors of horses and as inspectors of meats, who are qualified veterinarians, come within such authorization and may be commissioned in the Veterinary Corps with rank, pay, and allowances as specified in the act.

(64-221.4, J. A. G., Aug. 16, 1916.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

PAY AND ALLOWANCES: Foreign service pay.

The question was presented whether troops regularly stationed in the Canal Zone should be regarded as in foreign service and entitled to foreign service pay when their duties take them across the line into the Republic of Panama.

Held, that the duty to be performed by the troops in the Republic of Panama being merely incident to their assignment in the Canal Zone, they are not entitled to foreign service pay. Decision of June 26, 1916, 22 Comp. Dec., 701, distinguished.

(Comp. Treas., Aug. 7, 1916.)

PAY AND ALLOWANCES: Militia officers and enlisted men.

In respect of officers and enlisted men of the Organized Militia or National Guard *called* into the service of the United States, the Comptroller of the Treasury has made the following rulings, based upon existing law:

(a) Neither officers nor enlisted men are entitled to count their service in the Organized Militia or National Guard before the date when brought into the actual service of the United States for the purpose of longevity or continuous service pay. Officers are entitled to count their service after the date when brought into the actual service of the United States for the purpose of longevity pay, but enlisted men are not entitled to count such service for the purpose of continuous service pay. (Congress has provided for counting prior service in the Militia or National Guard in the case of officers and enlisted men of the National Guard *drafted* into the service of the United States under section 111 of the act of June 3, 1916.)

(b) Officers who had prior service in the Regular Army or Marine Corps are entitled to count such service for the purpose of increase of pay, but enlisted men who had such prior service are not entitled to count it for such purpose—except for one enlistment, as provided in the act of May 11, 1908.

(c) An enlisted man discharged from the Regular Army who is given a commission in a Militia or National Guard organization brought into the actual service of the United States is entitled to count his service in the Regular Army for the purpose of increase of pay as a commissioned officer of the Militia or National Guard, but an enlisted man so discharged who enlists in such an organization is not entitled to count his service in the Regular Army for the purpose of such increase of pay, and in either case, if he remains out of the Regular Army for a period of more than three months, he loses his right to count the continuous service which he had when discharged from the Regular Army in the event that he again enlists in the Regular Army.

(d) A commissioned officer of the Regular Army who holds a commission in a higher grade in the Militia or National Guard brought into the actual service of the United States is entitled to the pay of the grade he holds in the Militia or National Guard, and for such time as he holds it, he is not entitled to pay of his grade under his commission in the Regular Army. The pay in the higher grade is his "annual pay" within the meaning of the act of May 11, 1908 (35 Stat., 108), and it is on that pay that such officer is entitled to have his longevity increase of pay computed.

(Comp. Treas., Aug. 28, 1916.)

DECISION OF THE COURT.

(Digest prepared in the office of the Judge Advocate General.)

NEUTRALITY LAWS: What constitutes a "military expedition or enterprise."

Five persons were indicted in the Southern District of New York for conspiring and taking steps to blow up the Welland Canal in Canada in violation of section 13 of the Federal Criminal Code, which provides:

"Whoever, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be fined not more than three thousand dollars and imprisoned not more than three years."

The alleged purpose in the intended destruction of the canal was to cripple the transportation facilities of Great Britain used for the transportation of military forces.

Held, that in order to promote a "military expedition or enterprise," denounced by the act, there need not necessarily be a complete and high degree of military organization, but that if there be a pre-concerted plan of operations, with leadership, and a coordination of men and arms and munitions and other means for attacking the armies or navies of the belligerent, or crippling or destroying her military institutions, set on foot for the purpose and with the intention of so attacking the belligerent nation in either aspect, and thereby to render aid and assistance to the enemy, the military enterprise or expedition contemplated by the statute would seem to be complete.

(*United States v. Tauscher, et al.*, 233 Fed., 597.)

BULLETIN 39.

BULLETIN }
No. 39. }

WAR DEPARTMENT,
WASHINGTON, *October 6, 1916.*

The following digest of opinions of the Judge Advocate General of the Army for the month of September, 1916, and of certain decisions of the Comptroller of the Treasury and of a court, is published for the information of the service in general.

[2471382, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

TASKER H. BLISS,
Major General, Acting Chief of Staff.

OFFICIAL:

H. P. McCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ARMY RESERVE: Promotion of members in active service.

With reference to members of the Regular Army Reserve called to the colors and assigned to particular organizations of the Regular Army (sec. 31, national defense act),

Held, that when so assigned, reservists are eligible for promotion as other members of the organizations who are serving in the active period of their enlistment.

(6-151.1, J. A. G., Sept. 27, 1916.)

DETACHED SERVICE: Service in command of a headquarters company.

The national defense act of June 3, 1916, provides for certain headquarters organizations designated as headquarters company for the Infantry and Artillery, and headquarters troop for the Cavalry. (Secs. 17, 18, and 19.)

Held, that service of a commissioned officer in command of such a headquarters company or troop constitutes service "with a troop, battery, or company," within the purview of the detached-service act of 1912.

(6-124.23, J. A. G., Sept. 25, 1916.)

ENLISTED MEN: Commissioned service counted for purposes of retirement.

Section 1 of the act of March 2, 1907 (34 Stat., 1217), provides:

"When an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, * * *

Provided, That in computing the necessary thirty years' time all service in the Army, Navy, and Marine Corps shall be credited."

Held, that under this statute time served as a commissioned officer in the National Guard in the actual service of the United States, or as a member of the Officers' Reserve Corps in active service, may properly be counted toward retirement of an enlisted man.

(88-800, J. A. G., Sept. 22, 1916.)

ENLISTED MEN: Pay of members of Coast Artillery Bands.

Section 20 of the national defense act prescribing the composition of organizations of the Coast Artillery Corps operated to abolish the three grades of chief musician, principal musician, and chief trumpeter in the Coast Artillery Bands, and created in lieu thereof the two grades of band leader and assistant band leader. In a case where the principal musician, by reason of this statutory change, was reduced from that grade to band corporal the question was presented, in view of the provision in section 28, national defense act, that—

"Nothing herein contained shall operate to reduce the pay or allowances now authorized by law for any grade of enlisted men of the Army"—whether he was not entitled to receive the pay of his former grade of principal musician.

Held, that the effect of the provision quoted from section 28 is only to prevent the reduction in the pay of *grades* and has no application where a grade is abolished and a new grade created in lieu thereof, as in the present case, and that, therefore, the band corporal who was reduced from a principal musician could not while he held the position of band corporal, receive more as base pay than that prescribed by the statute for that grade.

(8-110, J. A. G., July 17, 1916.)

ENLISTMENTS: Conviction of a felony a disqualification.

An enlisted man of the National Guard was convicted of a crime in a Federal civil court and sentenced to imprisonment for 1 year and 10 months. By section 335 of the Federal Penal Code it is provided that "all offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies," and by section 1118, Revised Statutes, it is provided that "no person who has been convicted of a felony shall be enlisted or mustered into the military service." Section 69 of the national defense act declares with reference to the National Guard that "the qualifications for enlistment therein shall be the same as those prescribed for admission to the Regular Army."

Held, that the man, having been convicted of a felony, was disqualified for reenlistment in the military service, including the National Guard, and that a pardon would not remove the disqualification; and he could not therefore be reenlisted or mustered into the military service of the United States except upon the removal of the disqualification by an act of Congress.

(58-232, J. A. G., Sept. 23, 1916.)

NATIONAL GUARD: Additional pay of enlisted men qualified as gunners.

Certain enlisted men of the Coast Artillery, Connecticut National Guard, whose organizations were not called into the service of the United States, were individually inducted into the service for recruiting duty, in the absence of other troops available therefor. They were qualified as gunners under the Regular Army standards, and the question was presented whether they were entitled to additional pay as gunners for the time they were on recruiting duty.

Held, that the right to additional pay as qualified gunners is for the qualification itself, and is not dependent upon the character of the duty the men perform, and that the men were, therefore, entitled to the additional pay under the circumstances stated.

(72-240, J. A. G., Sept. 9, 1916.)

NATIONAL GUARD: Age limitation of officers.

Section 58 of the national defense act of June 3, 1916, prescribing the composition of the National Guard, provides that it "shall consist of the regularly enlisted militia between the ages of 18 and 45 years, organized, armed, and equipped as hereinafter provided, and of commissioned officers between the ages of 21 and 64 years."

Section 73 of the same act provides that commissioned officers—"now serving under commissions regularly issued shall continue in office, as officers of the National Guard *without the issuance of new commissions.*"

Held, that the purpose of the last-quoted provision was merely to dispense with the issuance of new commissions to officers continuing to hold their offices under the national defense act, and that it does not operate to continue in office any person not within the age limits prescribed in section 58.

(58-051.1, J. A. G., Sept. 16, 1916.)

NATIONAL GUARD: Commissioned officer holding elective State office.

The question was presented whether a commissioned officer of the National Guard in the actual service of the United States could legally hold at the same time an elective State office.

Held, that this is a question to be determined by the State where the elective office is held. (See 22 Op. Atty. Gen., 90.)

(58-241, J. A. G., Sept. 6, 1916)

OFFICERS' RESERVE CORPS: As to details for college duty.

The question was presented whether an officer of the Officers' Reserve Corps was eligible for detail, as an officer of the Army, for duty as professor of military science and tactics at an educational institution.

Held, that sections 37 and 38 of the national defense act prescribing the duties of members of the Officers' Reserve Corps operate to limit the duties upon which such officers may be employed to activity

in connection with military forces actually in the service of the United States, and that such officers are not eligible for detail, as officers of the Army, for duty at educational institutions.

(56-310, J. A. G., Sept. 28, 1916.)

RETIRED OFFICERS: Counting active service under detail for purposes of advancement in grade.

Held, that service of a retired officer under a commission in the volunteers during the Spanish-American War could not be counted for the purpose of advancement in grade under section 24 of the national defense act, last sentence, which applies only to officers "detailed to active duty."

(88-600, J. A. G., Sept. 30, 1916.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

GRATUITY: Designation of beneficiary.

An enlisted man designated a friend as his beneficiary to whom the death gratuity provided for by Congress (see A. R. 1385) should be paid. He afterwards married, but did not file with The Adjutant General of the Army a new form, making his wife his beneficiary. After his death his wife claimed the gratuity, and submitted an affidavit to the effect that her husband had told her that he had changed his designation and made her his beneficiary, and that he had sent the notification to Washington. She asserted that she was sure that he had mailed the new designation. Her affidavit was corroborated by a sergeant. The statute (act of May 11, 1908, 35 Stat., 108) declares that—

"The Secretary of War shall establish regulations requiring each officer and enlisted man to designate the proper person to whom this amount shall be paid in case of his death, and said amount shall be paid to that person from funds appropriated for the pay of the Army."

Held, that the gratuity is required by the statute to be paid in accordance with the formal designation of record, if there be such a designation, and that the evidence offered in the instant case could not be accepted as sufficient to justify payment to the widow.

(Compt. Treas., Aug. 3, 1916.)

TELEPHONE SERVICE: Installation of, in private quarters.

The commanding officer of a post requested authority for the installation of a telephone, at public expense, in his residence quarters, which he regarded "as absolutely necessary" for the transaction of public business "at other times than when at office headquarters." The act of August 23, 1912 (37 Stat., 414), prohibits the use of public funds "for telephone service installed in any private residence or

private apartment." Applying this statute in a similar case, the Comptroller of the Treasury said:

"Where an officer or employee of the Government has a regular office elsewhere than in his private residence, the maintenance in such residence, at public expense, of a telephone connected with his regular office is prohibited by the act of August 23, 1912, although the part of his residence in which the telephone is installed is set apart and designated also as an office." (22 Comp. Dec., 502.)

Held, that the installation of the telephone service requested at public expense was prohibited by the statute.

(Comp. Treas., Aug. 15, 1916.)

VEHICLES: Purchase of motorcycles.

Section 5 of the act of July 16, 1914 (38 Stat., 508), forbids the use of any appropriation made by Congress for the "purchase, maintenance, repair, or operation of motor-propelled or horse-drawn passenger-carrying vehicles for any branch of the public service of the United States unless the same is specifically authorized by law."

Held, that ordinary motorcycles are passenger-carrying vehicles within the prohibition of the act.

(Comp. Treas., Sept. 8, 1916.)

COURT DECISION.

(Digest prepared in the office of the Judge Advocate General.)

HABEAS CORPUS: Authority of State officers to arrest and detain soldiers for alleged misconduct while in the performance of military duty.

Two members of a company of the Ohio National Guard (a captain and a sergeant) while in the service of the United States and shortly after the President's call of June 18, 1916, were arrested by the municipal authorities of the city of Hamilton, Ohio, each on a charge of a breach of the peace. The accused each filed a petition for habeas corpus in the District Court of the United States, Southern District of Ohio. At the habeas corpus hearing the evidence was to the effect that the company to which the accused belonged was marching to the courthouse square in the city of Hamilton for the purpose of participating in a meeting to encourage the enlistment of recruits, and that some of the persons assembled along the way pressed forward so as to obstruct the marching of the company and were pushed back in order that the company might pass. The complaint against the officer and sergeant grew out of their action in thus clearing the way for their company. After their arrest by the civil authorities, charges were preferred against the officer and sergeant by the military authorities and the court-martial proceedings were pending at the time of the habeas corpus hearing.

The petitioners were discharged from the custody of the State authorities under the following rulings deduced from previous cases:

(a) An officer who, in the performance of what he conceives to be his official duties, transcends his authority and invades private rights,

is answerable therefor to the Government under whose appointment he acts, and to individuals injured by his action. But where there is no criminal intent, he is not liable to answer the criminal process of another government. The Federal courts have authority in habeas corpus proceedings to inquire into the guilt or innocence of persons committed on preliminary examination by a State tribunal on a criminal charge for acts done in the service of the United States, so far as to determine whether the acts were done wantonly and with criminal intent; and if not so done, the release must follow. (*In re Lewis*, 83 Fed., 159.)

(b) The Government of the United States and of a State, though exercised within the same territory, occupy different planes, and the criminal laws of the one have no application to acts performed under the authority of the other in respect of matters solely within its control; and an officer or agent of the United States who does an act which is within the scope of his authority, as such officer or agent, can not be held to answer therefor under the criminal laws of another and different government. (*In re Fair*, 100 Fed., 149.)

In the instant case, the court said:

"These men now before the court were in the employ of the United States as soldiers. They were mobilizing. They were in the discharge of their duty in endeavoring to get recruits. There is no evidence here of malice, wantonness, or criminal intent. Under the rulings made in the last three cases mentioned the State is not entitled to priority." (*In re Wulzen et al.*, United States District Court, Southern District of Ohio, 1916.)

BULLETIN 47.

**BULLETIN }
No. 47. }**

**WAR DEPARTMENT,
WASHINGTON, November 16, 1916.**

The following digest of opinions of the Judge Advocate General of the Army for the month of October, 1916, and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2489781, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

**H. L. SCOTT,
*Major General, Chief of Staff.***

OFFICIAL:

**H. P. McCAIN,
*The Adjutant General.***

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ARMY RESERVE: Continuation of gunner's pay on being called to the colors.

The question was presented whether a man furloughed to the reserve and returned to the colors with his battery is entitled to be carried as gunner, his qualification as such not having expired by limitation under A. R. 1344, which provides for the payment to a soldier of gunner's pay for one year after qualification, provided that "he continues to be a member of the Field Artillery or reenlists in that branch of the service within three months from date of discharge therefrom."

Held, that under the circumstances stated the soldier "continues to be a member of the Field Artillery," under a fair construction of the regulation, and is therefore entitled to gunner's pay.

(13-111.2, J. A. G., Oct. 21, 1916.)

ARMY RESERVE: Pay and allowances upon responding to mobilization order and being excused.

In the case of certain members of the Regular Army Reserve who reported in compliance with the mobilization order of June 28, 1916, and who were thereafter excused from mobilization, because of dependent families, under War Department instructions dated July 26, 1916, the question was presented as to their right to pay and allowances and mobilization pay. Under section 32 of the National De-

fense Act reservists are entitled to active pay and allowances when "mobilized * * * so long as they remain in active service."

Held as follows:

(a) Under the statute a reservist is entitled to active duty pay and allowances from the time he reports in person in response to a mobilization order until the time he is actually excused.

(b) As to whether clothing is an allowance to which a reservist is entitled under the circumstances stated, depends upon whether he actually avails himself of such allowance. Clothing is essentially an allowance in kind, furnished for use of enlisted men when they are accepted for actual service, and is commuted to a money value merely for convenience. Therefore, until a reservist is examined and found physically fit for service, and accepted for service, he is not entitled to any clothing allowance. After he is accepted for service he is entitled to draw clothing against his clothing allowance, but if he is excused before drawing clothing against his allowance he should not be credited with any such allowance.

(c) A reservist who, in obedience to a summons, reports at the designated place and is found physically qualified complies with the statute and his right to mobilization pay becomes vested and the same should be paid.

(72-200, J. A. G., Oct. 7, 1916.)

CLAIMS: Private property damaged by soldiers.

A private truck garden adjacent to a national guard mobilization camp was damaged by soldiers to the extent of \$175, for which claim was made by the owner.

Held, that the case came within the 54th Article of War, and that it was mandatory upon the commanding officer of the soldiers guilty of committing the damage to make reparation to the owner out of the pay of the offenders, and that if the individual offenders could not be identified stoppage should be made against all of the men present.

(18-420, J. A. G., Oct. 24, 1916.)

COMMUTATION OF HEAT AND LIGHT: Officers who rent quarters at their own expense.

The Army Appropriation Act for the fiscal year 1917 provides:

"For commutation of quarters, and of heat and light, to commissioned officers, members of the Nurse Corps, and enlisted men on duty at places where no public quarters are available."

Held, that in view of the fact that the appropriation limits the payment of commutation of quarters, heat and light to officers only when on duty at places where no public quarters are available, commutation of heat and light can not legally be paid to officers on duty in the field who are provided with tent quarters and who rent other quarters at their own expense.

(58-720, J. A. G., Oct. 2, 1916.)

COMPANY FUND: Not available for increasing the compensation of an enlisted grade.

Authority was requested to pay certain mess sergeants, Coast Artillery Corps, \$5 per month from the company fund, as additional compensation. The pay of mess sergeants is fixed by section 28 of the National Defense Act. Paragraph 329, A. R., authorizes the payment of additional compensation from the company fund to enlisted men for the performance of duty therein specified.

Held, that the company fund belongs to the enlisted men as an organization, and that it cannot legally be used to augment the compensation of any individual for the performance of duties properly belonging to his grade, and that paragraph 329, A. R., should not be construed as authorizing additional compensation from the company fund in any case for the performance of the regular duties belonging to a statutory grade; as for instance, the provision for additional pay of 25 cents per diem from the company fund to cooks was not intended to apply to men holding the regular statutory grade of cook, but was intended to apply to ordinary enlisted men detailed for duty as cooks. (Dig. Ops., J. A. G., 1912, p. 856.)

(40-200, J. A. G., Oct. 13, 1916.)

DENTAL SURGEONS: Advancement in rank, pay and allowances.

Section 10 of the National Defense Act provides for the appointment and commissioning of dental surgeons and for their advancement thereafter according to length of service and subject to examination.

Held, that this provision for advancement does not contemplate that it shall be by way of a new appointment and commission, as only the one office, that of dental surgeon, is created, and that increases in rank, pay and allowances come by operation of law and depend exclusively upon length of service and the passing of required examinations.

Held further, that dental surgeons are entitled to the benefits of section 32 of the Act of February 2, 1901 (31 Stat., 756), providing that:

"When the exigencies of the service of any officer who would be entitled to promotion upon examination require him to remain absent from any place where an examining board could be convened, the President is hereby authorized to promote such officer, subject to examination, and the examination shall take place as soon thereafter as practicable."

(64-220, J. A. G., Oct. 6, 1916.)

DESERTERS: Reward for apprehension.

A deserter from a national guard organization in the service of the United States was apprehended a few days after his regiment was mustered out, and the question was presented whether a reward for his apprehension could legally be paid. Paragraph 63, United States Mustering Regulations (1914), provides that the muster-out of the

service of the United States of a militia organization discharges from the Federal service, on the date of such muster-out, all officers and enlisted men who on that date belong to such organizations, "including all absentees *except* prisoners of war, deserters, * * *."

Held, that as the soldier in the instant case was not mustered out with his regiment, his status at the time of his apprehension was that of a deserter from the Army and that a reward was legally payable.

(26-200, J. A. G., Oct. 19, 1916.)

DETACHED SERVICE LAWS: Not amended by National Defense Act of June 3, 1916.

WAR DEPARTMENT, JUDGE ADVOCATE GENERAL'S OFFICE,
October 14, 1916.

To The ADJUTANT GENERAL:

1. First Lieutenant Joseph T. Clement, 37th Infantry, in a letter to The Adjutant General of the Army dated October 4, 1916, has requested that an approved opinion of this office referred to in an indorsement of The Adjutant General's Office dated September 30, 1916, as holding that so much of the National Defense Act as refers to headquarters, supply and machine gun companies is not retroactive, be reconsidered. Lieutenant Clement's request is made with a view to having his service with the supply company of the 9th Infantry from September 9, 1914, to April 5, 1916, counted as duty with troops, the supply company of that regiment being then organized as prescribed in the Table of Organization, 1914, and being substantially the equivalent of the supply company prescribed by the National Defense Act. Lieutenant Clement expresses the belief that the National Defense Act intends that the provisions relating to the Detached Officers' List, found in section 25 of that Act and reading—

"Provided further, That no officer of any of said arms of the service shall be permitted to remain on said Detached Officers' List for more than forty-five days unless he shall have been actually present for duty for at least two years out of the last preceding six years with an organization composed of one or more statutory units, or the equivalent thereof, of the arm to which he shall belong," shall be retroactive and operate to count as service with troops any service rendered by an officer prior to the passage of that act with statutory units or the equivalents of the statutory units established by the National Defense Act.

2. In the opinion referred to by Lieutenant Clement, which was rendered under date of June 5, 1916, this office did not pass specifically upon the question whether the provisions of the National Defense Act relating to the Detached Officers' List amended the detached service laws or was retroactive in any respect, but said with reference to the organization of headquarters companies and the service of adjutants therewith that—

"As regards the application of the Bill to existing regiments, it is self-executing and operates from the date of its approval upon the headquarters company whose elements are already in existence and

by the Bill are combined into the single organization so denominated. Even if a minor element or so be lacking, all substantial elements of the new organization are already in existence, and such a slight deficiency would not prevent the immediate operation of the Act. A regimental adjutant, therefore, actually present in a duty status with respect to such a headquarters company, is, and must be held to be, on duty with a company within the meaning of the detached service law."

3. However, the effect of the proviso of section 25 relied upon by Lieutenant Clement was discussed by this office in an opinion rendered September 8, 1916, which has been approved by the Secretary of War. In the opinion it was said:

"It is the opinion of this office that the following proviso in section 25 of the National Defense Act—

"That no officer of any of said arms of the service shall be permitted to remain on said Detached Officers' List for more than forty-five days unless he shall have been actually present for duty for at least two years out of the last preceding six years with an organization composed of one or more statutory units, *or the equivalent* thereof, of the arm to which he shall belong,' as its terms indicate, relates to eligibility for the Detached Officers' List only, and not to eligibility for detached service from troops, and that it does not amend the Detached Service Acts of August 24, 1912, and April 27, 1914."

4. Since it has been determined that the detached service laws have not been amended by the National Defense Act, it follows that service of an officer below the grade of major which has not been rendered with a troop, company or battery of the arm in which he holds commission cannot be counted as service with troops within the meaning of the detached service law. Therefore, since during the period covered by Lieutenant Clement's service with the supply company of the 9th Infantry a supply company was not a statutory organization, his service therewith cannot be credited as service with troops within the meaning of the detached service law.

W. A. BETHEL,
Acting Judge Advocate General.

(6-124.21, J. A. G., Oct. 14, 1916.)

DETACHED SERVICE: Officer on duty with Philippine Scouts.

The question was presented whether an officer in the grade of captain who was detailed as major of Philippine Scouts from August 16, 1911, to June 26, 1915, could be credited with duty with troops for that period.

Held, that as a major of Philippine Scouts the officer commanded a battalion of scouts and was not, therefore, on duty "with a troop, battery or company of that branch of the Army" in which he held a commission, as required by the detached service Act of August 24, 1912 (37 Stat., 571), the said act of 1912 not having been amended by section 25 of the National Defense Act.

(6-245, J. A. G., Oct. 10, 1916.)

ENLISTED MEN: Examinations for commission.

A former officer of the Philippine Scouts, 29 years of age, inquired whether he would be eligible, upon enlisting in the Regular Army, to take the examination for a commission under that portion of section 24 of the National Defense Act which provides that:

"Enlisted men of the Regular Army who have completed one year's service with an organization may become candidates for vacancies in the grade of second lieutenant created or caused by the increases due to the operation of this Act."

Held, that the service as an officer of the Philippine Scouts would confer eligibility within the meaning of the statute quoted, upon the reenlistment of the man.

(6-250, J. A. G., Oct. 10, 1916.)

ENLISTMENTS: As to qualifications of Indians.

The question was presented whether an Indian who was reported as "qualified except educational test" could legally be enlisted in the Regular Army. Section 2 of the Act of October 1, 1894 (28 Stat., 216), as amended by section 4 of the Act of March 2, 1899 (30 Stat., 978), provides that:

"In time of peace no person (except an Indian) who is not a citizen of the United States, or who has not made legal declaration of his intention to become a citizen of the United States, or who cannot speak, read, and write the English language, or who is over thirty-five years of age, shall be enlisted for the first enlistment in the Army."

Held, following the settled administrative construction of the statute that the exception as to Indians occurring in the clause relating to citizenship has no reference to the subsequent clauses prescribing educational qualifications and age limitation, and that therefore the educational qualifications for the first enlistment prescribed in the statute are requisite in respect of *all* persons enlisting in time of peace, including Indians.

(13-111.2, J. A. G., Oct. 21, 1916.)

NATIONAL GUARD: After call for Federal service—powers of State authorities.

The question was presented whether the State authorities may legally transfer enlisted men from a militia or national guard organization after such organization has been selected for Federal service by the Governor of the State pursuant to the call of the President.

Held, that after the President's call is transmitted to a militia or national guard organization there is established a relation between the United States and all members of such organization and a duty under Federal law on the part of such members to appear for muster, and that State authorities could not interpose to break or impair that relation or to relieve the members of their duty under the statute.

(58-100, J. A. G., Oct. 3, 1916.)

NATIONAL GUARD: Age qualifications for enlistment.

Questions were submitted and answered as follows:

(a) May the Department, on the theory of requiring conformity in such respects to the Regular Army, prescribe 35 as the maximum age for enlistment in the National Guard? *Answer:* No. True, "the qualifications for enlistment shall be the same as those prescribed for admission to the Regular Army" (Sec. 79), but this general provision can have no reference to a qualification elsewhere specifically prescribed, as is the age limit. The National Guard age qualification is made the subject of specific consideration and provision in sections 57 and 58 of the National Defense Act, and differs from that prescribed for the Regular Army.

(b) Must an enlisted man be discharged from service on reaching 45, or may he continue to serve out his enlistment? and

(c) If he may serve out such enlistment, may he thereupon be reenlisted? *Answer:* My opinion is that he may serve out his enlistment and may thereupon be reenlisted, if otherwise qualified. The proviso to section 69 of the National Defense Act puts the question beyond doubt wherein it provides—

"That in the National Guard the privilege of continuing in active service during the whole of an enlistment period and of reenlisting in said service shall not be denied by reason of *anything* contained in this Act."

This privilege to continue in active service for the whole enlistment period is, by the terms of the proviso, as available in an enlistment period containing the 45th year as in any other enlistment. See also section 57, same act, prescribing the composition of the Militia, out of which comes the National Guard (Sec. 58), wherein said section 57 provides that the Militia is composed of those who are more than 18 years of age and, *except as hereinafter provided*, not more than 45 years of age.

(58-051, J. A. G., Oct. 23, 1916.)

NATIONAL GUARD: As to effect of taking Federal oath.

Upon the questions (a) whether officers who have taken the oath prescribed by section 73 of the National Defense Act but who belong to organizations the enlisted men of which have not taken the oath prescribed by section 70, are officers of the National Guard within the meaning of that Act; and (b) what effect will the taking of the oath prescribed in section 70 of the National Defense Act by an enlisted man of the Organized Militia of the State have upon his enlistment in the Organized Militia under the law of his State?

Held, as to (a) that an officer of the Organized Militia who takes the oath prescribed by section 73 of the National Defense Act becomes an officer of the National Guard under the National Defense Act, that there may be a recognition of an individual member of the National Guard, officer or enlisted man, separate and apart from the recognition of the organization to which he belongs, that while under the provisions of section 110 pay can only accrue to officers and enlisted men belonging to recognized organizations, the recognition of an officer or enlisted man separately may have substantial value,

in that he thereby becomes qualified for appointment to office in the National Guard under section 74, and if an officer between the ages of 21 and 27 years becomes eligible for appointment as second lieutenant in the Regular Army under section 24; and as to (b) that the taking of the oath prescribed by section 70 by an enlisted man of the Organized Militia transforms the enlisted man of the Organized Militia into a member of the National Guard and substitutes a new enlistment contract for his former State enlistment contract. (58-057, J. A. G., Oct. 12, 1916.)

NATIONAL GUARD: As to retention of officer in Federal service after muster-out of his organization.

In the case of a National Guard officer who was on sick leave request was made for authority to retain him in the Federal service after the muster-out of his organization, until his complete recovery from his ailment.

Held, that while the retention in the Federal service of a particular National Guard officer may be authorized for a short period after the muster-out of his organization, to enable him to perform any duty pertaining to the completion of the records of his organization, or for other duty, the retention of such an officer in the Federal service after the muster-out of his organization solely for the purpose of permitting him to draw Federal pay would not be legal.

(58-160, J. A. G., Oct. 6, 1916.)

NATIONAL GUARD: Furlough of enlisted man to the reserve.

An enlisted man of the National Guard upon the completion of his three-year active enlistment period desired to remain in the active service for one year longer and then be furloughed to the reserve. Section 69 of the National Defense Act provides:

"That in the National Guard the privilege of continuing in active service during the whole of an enlistment period and of reenlisting in said service shall not be denied by reason of anything contained in this Act."

Held, that the sense of the above statutory provision is that an enlisted man of the National Guard who elects to remain in service instead of being furloughed to the National Guard Reserve at the expiration of the first three-year period of his enlistment must make the election as to the whole of his enlistment period, and that the soldier in the instant case could not elect to remain in the active service only one year of the remaining three years of his enlistment period.

(58-214, J. A. G., Oct. 16, 1916.)

NATIONAL GUARD: Restoration of reservist to active duty.

The question was presented whether a national guardsman who passed to the National Guard Reserve while his organization was in the actual service of the United States could, upon his own applica-

tion, be restored to active duty with his regiment. Section 78 of the National Defense Act provides that:

"A National Guard Reserve shall be organized in each State, Territory, and the District of Columbia, and shall consist of such organizations, officers, and enlisted men as the President may prescribe, or members thereof may be assigned as reserves to an active organization of the National Guard."

Held, that until an organization thereof is prescribed by the President the National Guard Reserve remains an unorganized force, and that therefore when a soldier passes to that reserve he becomes one of a class of militia which has not been called into the service of the United States, and there is no legal authority for accepting him into the Federal service until his class is called into the service of the United States pursuant to law.

(58-100, J. A. G., Oct. 2, 1916.)

NATIONAL GUARD: Transportation of private mounts of officers mustered out.

Held, that upon the muster out of the Federal service of an officer of the National Guard at a State mobilization camp there is no authority for the transportation of his private mounts at public expense from such camp to the officer's home.

(94-231, J. A. G., Oct. 28, 1916.)

PUBLIC PROPERTY: Sales to attendants at training camps.

Section 54 of the National Defense Act providing for the maintenance of military training camps authorizes the Secretary of War—"to sell to persons receiving instruction at said camps, for cash and at cost price plus ten per centum, quartermaster and ordnance property," required for their proper equipment.

Held, that such sales are authorized only to persons while they are in actual attendance at the camps "receiving instruction" thereat, and that there is no authority to fill orders for such property received from former attendants.

(80-131, J. A. G., Oct. 12, 1916.)

TRANSPORTATION: Excess passenger baggage.

An officer having been directed by the War Department to proceed at once from San Diego, Cal., to Fort Sam Houston, Texas, for duty in the field applied to the local quartermaster for the transportation of his field allowance of baggage. The quartermaster issued a transportation request for its shipment as excess passenger baggage at an expense of \$13.18. Inasmuch as this method of shipment was unauthorized and the cost not payable from public funds (A. R., 1122, 1123, and 20 Comp. Dec., 182), the question was presented whether the officer whose baggage was thus transported or the quartermaster who furnished the transportation request should be required to pay the cost of the shipment.

Held, that under the provisions of the regulations mentioned the duty of the quartermaster was clear; that the other officer was

entitled to have his baggage shipped without expense to himself, and that as the quartermaster failed to make the shipment in accordance with the regulations the latter should be required to pay the cost of the shipment.

(94-232, J. A. G., Oct. 17, 1916.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

ENLISTED MEN: Absence due to misconduct.

In a recent case involving the absence of an enlisted man of the Army Schools Detachment, United States Military Academy, on account of disease resulting from his own misconduct, the question was raised whether the Act of April 27, 1914 (38 Stat., 353), applied to enlistments in the Military Academy detachment entered into prior to the passage of that act.

Held, that if in the instant case the soldier's absence from duty was on account of disease resulting from his own misconduct, contracted after the date of the above-mentioned act, pay was properly deducted and should not be refunded.

Note.—In explaining and amplifying former decisions the Comptroller said:

"In the decision of January 30, 1913 (19 Comp. Dec., 483), construing the act of August 24, 1912, it was held that if a soldier is absent from duty on account of disease resulting from his own misconduct contracted in the enlistment in which he was then serving, but prior to the passage of the act of August 24, 1912, no deduction of pay should be made, but if the absence was on account of a disease contracted in such enlistment after August 24, 1912, the deduction should be made. Such has been understood in this office to be the effect of the decision of January 30, 1913. (See also 20 Comp. Dec., 348.)

"The act of August 24, 1912, did not apply to the military academy detachment because said detachment was not paid from the Army appropriation for pay of the Army. The act of April 27, 1914, is applicable to such organization. As the act of April 27, 1914, is the same in all material respects as the act of August 24, 1912, the principle of the decision of January 30, 1913, applies equally under the act of April 27, 1914."

(Comp. Treas., Oct. 2, 1916.)

CLAIMS: Loss or damage to personal baggage.

Held, that where the evidence submitted to the accounting officers of the Treasury in support of a claim for reimbursement under, and subject to the limitations of, the Act of March 3, 1885 (as extended by the Act of March 4, 1915), for personal baggage of an officer or enlisted man of the Army lost or damaged in changing station, establishes that such loss or damage was incurred in transit and through no fault or negligence of the owner, such reimbursement is authorized under that act.

(Comp. Treas., Sept. 29, 1916.)

CIVILIAN EMPLOYEES: Expenses for meals at home station.

Certain civilian employees of the Engineer Corps claimed reimbursement of the amount expended for meals at their home station when it was impracticable or inconvenient for them to go to their regular eating places.

Held, that it was an incident or condition of service in which the employees were engaged that they could not at all times be near their regular boarding places at meal time, and that reimbursement for such personal expenses as meals would be in the nature of additional compensation and as such prohibited under section 1765, Revised Statutes.

(Comp. Treas., Aug. 11, 1916.)

COMMUTATION OF QUARTERS: Enlisted man on temporary duty away from his regular station.

ENLISTED MEN: Absence due to misconduct.

A quartermaster sergeant, whose permanent station was at the office of the Depot Quartermaster, Seattle, Wash., was sent to Fort Worden, Wash., for temporary duty where he remained on duty from July 12 to August 22, 1916. While on such temporary duty he was attached to the Quartermaster Corps detachment at Fort Worden for rations and was quartered with the detachment in the detachment quarters, which were in the corral over the wagon shed. During such temporary absence he continued to rent quarters at his regular station and claimed the right to receive commutation therefor.

Held, that, it appearing that the soldier was furnished with quarters in kind with the detachment to which he was attached while on temporary duty and that the quarters so furnished were of the same kind or character as the other members of the detachment received, he was not entitled to quarters or commutation of quarters elsewhere, and that his claim could not legally be allowed.

(Comp. Treas., Oct. 19, 1916.)

CONTINUOUS SERVICE PAY: Enlisted men.

Held, that an enlisted man who is discharged from the Regular Army to accept a commission in the officers' reserve corps of the Regular Army, and who remains in service in said corps more than three months loses his right to credit for continuous-service pay as an enlisted man of the Regular Army.

(Comp. Treas., Sept. 28, 1916.)

MILEAGE: Retired officer serving as witness.

Held, that a retired officer of the Army who serves as a witness before a court-martial is entitled, for travel performed in going to and returning from the court, only to the mileage provided for civilian witnesses in such cases, and not to the mileage provided for officers of the Army traveling under competent orders, without troops, although he was expressly ordered by the Secretary of War to appear as a witness before the court-martial.

(Comp. Treas., Sept. 28, 1916.)

NATIONAL GUARD: Payment of recruits between date of enlistment and date of muster-in or rejection.

In the case of National Guard recruits for the Federal service enlisted after the President's call of June 18, 1916, the question was presented whether men recruited for the purpose of bringing the organizations up to the *maximum* strength were entitled to be paid from the date of their enlistment to the date of their muster-in, or to the date of their rejection after physical examination. As to enlistments to bring the organizations up to the required *minimum* strength for Federal service, the Army Appropriation Act of August 29, 1916 (Public No. 242, p. 6), provides for payment.

Held, that in the case of enlisted men recruited for the purpose of bringing a National Guard organization up to the maximum strength, who are mustered in, payment may be made from the date of enlistment to the date of muster-in, but that in the case of those similarly enlisted who are rejected, after physical examination, there is no authority for their payment from Federal funds for the time between the date of enlistment and the date of rejection.

(Comp. Treas., Sept. 30, 1916.)

BULLETIN 57.

BULLETIN }
No. 57. }

WAR DEPARTMENT,
WASHINGTON, December 22, 1916.

The following digest of the opinions of the Judge Advocate General of the Army for the month of November, 1916, and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2506586, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Major General, Chief of Staff.

OFFICIAL:

H. P. McCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

APPOINTMENT OF OFFICERS: Age limitations for examination and appointment of civilians.

The law governing the appointment of second lieutenants of Engineers from civil life is found in section 24, National Defense Act, and section 5 of the Act of February 27, 1911 (36 Stat., 957), which requires that—

“To become eligible for examination and appointment, a civilian candidate for appointment as second lieutenant must be * * * between the ages of 21 and 29 * * *.”

Held, that both the examination and the appointment must come within the age limits specified by the statute, and that an applicant who failed in an examination was not eligible for a reexamination and appointment after he had passed the maximum age limit.

(64-210.2, J. A. G., Nov. 17, 1916.)

APPOINTMENT OF OFFICERS: Competitive examination of enlisted man delayed through error of military authorities.

An enlisted man was prepared for and entitled to compete in an examination for a commission held in August, 1916, but was prevented from taking that examination through an error of the military authorities in transmitting his notice to the wrong address, resulting in his having to wait until October for his examination.

Held, that upon his being found qualified in the latter examination, the soldier was entitled to be rated with the candidates who were found qualified in the August examination, and was entitled to place in line for appointment under section 24, National Defense Act, ahead of those candidates qualifying in the October examination—the delay in his examination being due to no fault on his part.

(64-212, J. A. G., Nov. 10, 1916.)

APPOINTMENT OF OFFICERS: Examinations for commission.

An officer of the Philippine Scouts competed in an examination given for enlisted men for commissions. He had not completed one year's service in the Scouts, but relied upon his service of four years in the Marine Corps as qualifying him as a candidate for a commission under section 24 of the National Defense Act, which provides that officers of the Philippine Scouts shall be eligible for commission under the same conditions as enlisted men, and further declares that—

"Enlisted men of the Regular Army who have completed one year's service with an organization may become candidates for vacancies in the grade of second lieutenant created or caused by the increases due to the operation of this Act."

Held, that the statute contemplates one year's service in the Army and that the officer of the Philippine Scouts was not qualified by reason of his service in the Marine Corps.

(64-213.5, J. A. G., Nov. 8, 1916.)

ENLISTED MEN: Clothing allowance.

The commanding officer of a National Guard organization called attention to a case in which an enlisted man had been discharged on account of disability after only ten days' service. There had been issued to him \$30 worth of clothing, and he had no other clothes nor any money. The pay due him was only \$5. The officer inquired: "What must the officer who is responsible for the clothing do in such a case?"

Held, that the title to clothing issued to enlisted men either in the Regular Army or in the National Guard remains in the United States, and that in the instant case the clothing issued against the soldier's initial allowance should be retained in the possession of the Government by the responsible officer, except only such clothing as would be necessary for the soldier to wear home.

(72-420.2, J. A. G., Nov. 11, 1916.)

DETACHED OFFICERS' LIST: Details therefrom.

The second proviso of section 25, National Defense Act, provides that no officer shall be permitted to remain on the Detached Officers' List who has not been on duty with troops as therein prescribed, and further declares that, "except as before prescribed in this proviso, all officers who shall have been assigned to said list shall remain thereon for not less than four years from the respective dates of their assignment thereto, unless in the meantime they shall have been separated entirely from the Army, or shall have been promoted or appointed to higher offices, or shall have been retired from active service."

Held, that while an officer's name must be removed from the Detached Officers' List when he has not had certain service with troops, it cannot otherwise be removed from that list (except on account of retirement, separation from service, etc.) until it has been thereon for at least four years; therefore an officer's name may not be removed from the Detached Officers' List for the purpose of detailing

him to the General Staff Corps for the reason that while officers may, pursuant to various provisions of law, be transferred from one position to another, as from line to staff and vice versa, or from line to Detached Officers' List and vice versa, it is clear that one officer may not hold two positions at the same time, thus: An officer may not occupy a position in the line and one in the staff at the same time; neither may he occupy a position on the Detached Officers' List and one in the staff or line at the same time.

(6-245, J. A. G., Nov. 6, 1916.)

ENLISTED MEN: Discharges for convenience of the Government.

In the case of a soldier discharged from an enlistment in which he had served more than two years to enable him to accept a commission, and who reenlisted within three months, the question of what enlistment period he was then serving in turned upon the point whether the discharge was for the convenience of the Government. (Act of May 11, 1908, 35 Stat., 109.)

Held, that the discharge of an enlisted man to enable him to accept a commission is a discharge for the convenience of the Government.

(34-225, J. A. G., Nov. 17, 1916.)

ENLISTED MEN: Pay of private, Medical Department.

A private of the Medical Department serving an enlistment entered into prior to the passage of the National Defense Act, and hence entitled to the old rate of \$16 per month, was promoted to private, first class, but was later reduced to the grade of private. The question was presented whether he should be paid \$15 a month, the new rate for the grade of private, Medical Department (Sec. 28, National Defense Act), or whether he was entitled to resume the \$16 rate.

Held, that the saving clause at the end of section 28, National Defense Act, operates to continue the pay of the grade of private, Hospital Corps, for the benefit of enlisted men during the remainder of their enlistments existing June 3, 1916, and that, therefore, the soldier, upon his reduction to the grade of private, was entitled to the old rate of \$16 per month.

(72-200, J. A. G., Nov. 14, 1916.)

NATIONAL GUARD: Grade and pay of chaplains.

Section 1 of the Act of April 21, 1904 (33 Stat., 226), provides that "all persons who may hereafter be appointed as chaplains shall have the grade, pay, and allowances of first lieutenant, mounted, until they shall have completed seven years of service," and further that "chaplains shall have the grade, pay, and allowance of captain, mounted, after they shall have completed seven years of service."

Held, that chaplains of the National Guard having had seven years of continuous service as chaplains immediately prior to being

mustered into the service of the United States or who may complete seven years of service after being mustered into the Federal service, are entitled to the pay and allowances of captain by virtue of their service, and no act of the appointing power is required.

Held further, that chaplains of the National Guard may be recognized as chaplains in the grade of major after they have been appointed to that grade by the governors of their respective states after having had the requisite service for ten years in the grade of captain—but not otherwise.

(58-700, J. A. G., Nov. 2, 1916.)

NATIONAL GUARD: Pay of organizations below the minimum strength when called into the Federal service.

In a National Guard Regiment that was embraced in the President's call for Federal service there were a number of companies from whom the War Department had withdrawn recognition because they were not maintained up to the required standard of strength. On the question whether the members of such companies responding to the President's call were entitled to pay from the time they reported at their company rendezvous,

Held, that the withdrawal or withholding of the Department's recognition of a Militia organization operates to deprive such organization of the right to participate in the Federal appropriations but does not operate to discharge the members of such organization from their obligation under their oath and contract of enlistment to respond to the President's call for Federal service, and that they are entitled to Federal pay as provided by statute from the time they report at their company rendezvous; and this applies also to those who may later, upon examination, be found physically unfit for service and are discharged.

(58-201, J. A. G., Nov. 29, 1916.)

NATIONAL GUARD: Transportation of officers' authorized private mounts.

National Guard officers called into the active service of the United States authorized to be mounted are entitled to have their authorized private mounts transported from the home rendezvous to the mobilization camp at public expense, the cost being payable from the appropriation for the transportation of the Army and its supplies.

(94-061, J. A. G., Nov. 23, 1916.)

Upon the muster-out of the Federal service of such officers the transportation of their horses from the place of muster-out to their home rendezvous is not authorized, this conclusion being based upon the provision of A. R. 1098 against the shipment of an officer's mounts after his separation from the active service.

(94-061, J. A. G., Oct. 28, 1916.)

OFFICERS: Relative rank.

Section 1219, Revised Statutes, provides that in fixing relative rank between officers of the same grade and date of appointment and commission, the time which each may have actually served as a

commissioned officer of the United States, whether continuously or at different periods, shall be taken into account; and section 24, National Defense Act, contains the provision that officers appointed to original vacancies in the grade of second lieutenant created or caused by that Act, "shall take lineal and relative rank according to dates of appointment; and the lineal and relative rank of second lieutenants appointed on the same date shall be determined under such regulations as the Secretary of War may prescribe, * * *"

Held, that the former statute was not modified by the latter provision and that the persons appointed provisional second lieutenants to fill vacancies created or caused by the Act of June 3, 1916, and who have had commissioned service in the National Guard in the service of the United States or in the Philippine Scouts are entitled, under section 1219, Revised Statutes, to have the time so served as commissioned officers taken into account in fixing their relative and lineal rank.

Held further, that the benefit of former commissioned service under section 1219 of the Revised Statutes is effective only within the class from which the appointee is selected, since section 24 creates an order of preference in which appointments are made which is not disturbed by the provisions of section 1219, Rev. Stat.

(64-200, J. A. G., Nov. 16, 1916.)

OFFICERS' RESERVE CORPS: Appointment of members on examining boards.

In the rules prescribed for examinations for appointments in the Officers' Reserve Corps (G. O. 32, W. D., 1916, p. 10) it is directed, with reference to the composition of examining boards, that—

"The members of these boards will be appointed from the Regular Army or from the Regular Army and the Officers' Reserve Corps."

Held, that the provision for the appointment of members of the Officers' Reserve Corps on such boards applies only to officers who have been called into the active service, as there is no authority of law for so utilizing the services of members of the Officers' Reserve Corps who have not been called into active service for other purposes in accordance with law.

(76-030, J. A. G., Nov. 14, 1916.)

PUBLIC PROPERTY: Use of for private purposes.

The master of a quartermaster steamer, by permission of the local post commander, employed the vessel for commercial use as a tug, charging for the services of towing commercial vessels on twelve occasions enough to cover expenses for coal, oil, etc. Gratuities also were accepted aggregating \$605, and "equitably divided among the members of the crew."

Held, that in the absence of a real emergency, the commercial use of the tug was improper and in violation of law and regulations and the officer was subject to censure; and further that if the occasion on which the use of the vessel was permitted by him could be regarded as one of emergency, "he would be censurable for allowing

this use to continue for a period of over two months without reporting the facts to his superior officers."

Held further, that the officer should be required to deposit to the credit of miscellaneous receipts the funds received by the master for these services and divided among the crew, he being allowed to collect from the crew, as far as practicable, the amounts they respectively received for the services rendered by the steamer.

(78-100, J. A. G., Nov. 15, 1916.)

SEAMEN: General laws applicable to members of Army transport crews.

Section 11 of the Act of March 4, 1915 (38 Stat., 1168), provides that "it shall be lawful for any seaman to stipulate in his shipping agreement for an allotment of any portion of the wages he may earn to his grandparents, parents, wife, sister, or children."

Held, that it being settled that members of the crew of an Army transport, who are civilian employees, are subject to the restrictions and entitled to the benefits of the same laws as merchant seamen, it follows that they are entitled to the benefits of the above mentioned Act.

(94-124, J. A. G., Nov. 21, 1916.)

TRANSPORTATION: Officers' change of station baggage allowance.

A first lieutenant whose regular station was at San Francisco was sent to the border for duty and furnished 25% of his baggage transportation allowance. He was subsequently promoted to captain and assigned to a new regiment regularly stationed at El Paso.

Held, that the assignment of the officer to the new regiment operated to change his permanent station from San Francisco to El Paso, and that he became entitled to the permanent change of station allowance of baggage of the grade held by him on the date of his actual change to the new command, subject to a deduction of the number of pounds already shipped under the 25% allowance to officers on temporary duty.

(94-232, J. A. G., Nov. 15, 1916.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

APPROPRIATIONS: Expenses for abstract of title.

The expenses incurred in the preparation of an abstract of title to land about to be acquired by the United States, when such abstract was procured for use in contemplated purchase of the land, and not for use in condemnation proceedings, should be paid from the appropriation used for the purchase of the land, regardless of the fact that said abstract may ultimately be used in condemnation proceedings.

(Comp. Treas., Oct. 28, 1916.)

TRANSPORTATION: Charge for special services rendered by transportation company.

. In connection with the transportation by the Government of horses from Washington, D. C., to St. Louis, Mo., the railroad company put in a bill for \$3 for feed, unloading, loading, and switching at St. Louis, submitting with the bill an order of the attendant accompanying the horses requiring such service.

Held, that the service having been rendered in accordance with the orders of the attendant, the charges should be paid.

(Comp. Treas., Dec. 1, 1916.)

BULLETIN 3.

BULLETIN }
No. 3. }

WAR DEPARTMENT,
WASHINGTON, *January 19, 1917.*

The following digest of opinions of the Judge Advocate General of the Army for the month of December, 1916, and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2520529, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Major General, Chief of Staff.

OFFICIAL:

H. P. McCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

CONFINEMENT: Time awaiting trial and result, for desertion, not counted on restoration towards completion of enlistment.

The 48th Article of War provides that:

"Every soldier who deserts the service of the United States shall be liable to serve for such period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment; * * *"

The matter of the completion of an enlistment entered into prior to April 27, 1914, in the case of a convicted deserter restored to duty, is governed by the 48th Article of War, as interpreted by Paragraph 130, Army Regulations, which means that the time spent in confinement awaiting trial and serving sentence for desertion will not count toward the completion of the enlistment. This construction is in line with the general provisions contained in the Act of April 27, 1914 (38 Stat., 353), requiring that an enlistment (entered into on and after that date) shall not be regarded as complete until the soldier shall have made good any time in excess of one day lost by unauthorized absence, or on account of disease resulting from his own intemperate use of drugs or alcoholic liquors or other misconduct, *or while in confinement awaiting trial or disposition of his case if the trial results in conviction, or while in confinement under sentence.*

(34-052, J. A. G., Dec. 27, 1916.)

DETACHED SERVICE: Officer on duty as Squadron Adjutant.

Having reference to his detached service status, an officer inquired "whether or not, under the National Defense Act of June 3, 1916, a Squadron Adjutant is to be given duty status while holding

that office, presuming he is present for duty with his regiment and exercises the functions of his office."

Held, that the detached service laws were not amended or qualified by the National Defense Act (Bul. 47, W. D., 1916, p. 6), and that, therefore, answer to the question is found in the Department's decision of June 15, 1916 (Bul. 26, W. D., 1915, p. 3), that duty as a Squadron Adjutant is a detail on detached service within the meaning of the Act of August 24, 1912.

(6-124.23, J. A. G., Dec. 18, 1916.)

DETACHED SERVICE: Regimental Adjutants, Field Artillery.

The question was presented whether a regimental adjutant of Field Artillery is to be deemed present for duty with a troop, battery, or company, within the meaning of the Detached Service Act of Aug. 24, 1912.

Held, as follows: As to a regiment of infantry, it has been held that the adjutant thereof is on duty "with a troop, battery or company" within the purview of the detached service law, because he is in command of the headquarters company (Bul. 39, W. D., 1916, p. 12). While the National Defense Act provides that a regimental adjutant of Infantry or Cavalry shall command the headquarters company or headquarters troop, as the case may be, this is not so as to the adjutant of a Field Artillery regiment. He does not command the headquarters company, the supply company, nor any battery in the regiment, other captains having been provided as component parts of those organizations for that purpose. (Sec. 19, National Defense Act.) A regimental adjutant of Field Artillery is, therefore, an additional officer, and he is not, so long as he occupies his normal status as adjutant, on duty with a troop, battery, or company, within the meaning of the detached service act of 1912.

(6-124.23, J. A. G., Dec. 18, 1916.)

EIGHT-HOUR LAW: Purchase of flying machines.

On complaint that a manufacturing company, in the execution of their contract with the United States Government for flying machines, required of their mechanics, in violation of the eight-hour law, more than eight hours' labor per day.

Held, that as the Eight-Hour Act of June 19, 1912 (37 Stat., 137), expressly excepts from its operation "contracts * * * for such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not," etc., and as the contract in question to cover purchase is an agreement to deliver completed articles of manufacturers' make, rather than an agreement for their construction, it being a matter of public knowledge that flying machines are articles which are manufactured for sale and may be purchased in open market; a contract for such machines, although requiring the particular machines to conform in certain particulars to Signal Corps specifications, is not within the operation of the eight-hour law.

(32-313, J. A. G., Dec. 29, 1916.)

ENLISTED MEN: Detail of noncommissioned officers for service in the National Guard.

Section 36 of the National Defense Act authorizes the detail of not to exceed 1,000 sergeants as instructors of the National Guard, and 100 sergeants as instructors of organizations at the U. S. Disciplinary Barracks, and provides that they "shall be additional to the sergeants authorized by this Act for the corps, companies, troops, and detachments from which they may be detailed."

Held, that the statute only authorizes additional *sergeants*, and that while it may be advisable and permissible at times to detail sergeants, first class, to duty as instructors (Bul. 28, W. D., 1916, p. 9), such an assignment can not operate to increase the authorized number of sergeants, first class, which is fixed by law.

(6-156, J. A. G., Dec. 20, 1916.)

ENLISTED MEN: Engaging in civil employments.

In the case of an enlisted man who was granted a furlough under authority of regulations to extend to the date of his retirement, complaint was made that during such period of furlough the soldier was engaging in business, in violation of Section 35 of the National Defense Act.

Held, that while an enlisted man on leave of absence or ordinary furlough is unquestionably to be deemed in active service within the meaning of this term as used in the statute mentioned, it would go beyond the primary purpose of the law to apply it to a case like this where the furlough has been granted to an enlisted man under authority of regulations to extend to the date of his retirement, it not being within the contemplation of the authorities granting the furlough that he will ever resume active duty, and that, therefore, in such cases the soldier may accept employment or engage in business without reference to the provisions of Section 35 of the National Defense Act.

(6-153.4, J. A. G., Dec. 4, 1916.)

ENLISTED MEN: Pay for time spent in military confinement subject to jurisdiction of civil authorities.

Under Executive Order No. 50, Philippine Islands, August 7, 1912, an enlisted man, having been arrested by the civil authorities, was turned over to the military authorities for confinement, subject to the disposition of his case in the civil courts.

Held, that the soldier was not entitled to pay for the time he was held in confinement subject to the jurisdiction of the civil authorities, his status with respect to his availability for military service during such period of confinement being substantially the same as if he had been in the actual custody of the civil authorities, and governed by A. R. 1371.

(6-250, J. A. G., Dec. 4, 1916.)

MEDICAL RESERVE CORPS: Purchase of Ordnance, etc., by members not in active service, of doubtful legality—but members of Officers' Reserve Corps may purchase.

On inquiry by an officer of the Medical Reserve Corps as to his right to purchase from the Ordnance Department a Springfield rifle, etc., for use in big game hunting.

Held, that as the Act of March 4, 1911, which created the Medical Reserve Corps, conferred upon the holders of commissions issued thereunder "all authority, rights and privileges of commissioned officers of the like grade in the Medical Corps of the Army, except promotion, *but only when called into active duty*," and that, as section 37 of the National Defense Act makes officers of the Medical Reserve Corps eligible for appointment to the Medical section of the Officers' Reserve Corps, and further that the "Medical Reserve Corps as now constituted by law" shall "cease to exist one year after the passage" of the National Defense Act, the sale of ordnance or ordnance property to officers as members of the Medical Reserve Corps, such officers not being in active service, would be of doubtful legality, and *recommended* that such sale be not made when the officer will not be appointed to the Officers' Reserve Corps.

Held further, that Paragraph 1520, Army Regulations, as to sales of ordnance, etc., to officers, etc., is sufficiently broad to include members of the Officers' Reserve Corps. This accords, in principle, with the opinion of the Judge Advocate General of November 9, 1916, to the effect that as the Officers' Reserve Corps is an integral part of the Army of the United States as established by section 1 of the National Defense Act, its members are entitled to purchase uniforms, clothing and equipage under Paragraph 1174, Army Regulations.

(6-301, J. A. G., Dec. 23, 1916.)

NATIONAL GUARD: Commission of officer expiring while he is in the Federal service.

Section 73 of the National Defense Act provides:

"Commissioned officers of the National Guard of the several States, Territories and the District of Columbia now serving under commissions regularly issued shall continue in office, as officers of the National Guard, without the issuance of new commissions," upon taking the prescribed oath.

Held, that this provision operates only to render effective in the National Guard commissions issued by a State and does not prolong the officer's commission, and that a National Guard officer in the service of the United States can not, under existing law, be compelled to continue in the service of the United States as an officer of the National Guard after the expiration of his commission.

(58-100, J. A. G., Dec. 6, 1916.)

(58-241, J. A. G., Dec. 8, 1916.)

NATIONAL GUARD: Furlough of enlisten men to the Reserve.

The following questions were submitted:

(a) "Can a member of the National Guard be furloughed to the reserve before the end of the active service period?"

(b) "Can a member of the National Guard, once furloughed before the end of the three year term of active service, be removed from the reserve and be restored to the active list to serve the remainder of the three year active term?"

Section 72, National Defense Act, provides that an enlisted man *discharged from service* in the National Guard shall receive the discharge in writing as there prescribed, and that in time of peace discharges may be given prior to the expiration of terms of enlistment under such regulations as the President may prescribe.

Held, that the word "service," as used in Section 72, relates to the active three year period, and that an enlisted man is entitled to a discharge in writing at the end of such period; that such discharge is not the final and absolute discharge so familiar to the Regular Army, but is a release from active service, remitting the soldier to the reserve. *Held*, as to (a), that since Section 72 unqualifiedly authorizes discharge in time of peace, under regulations prescribed by the President, a National Guardsman may be discharged from active service and transferred to the reserve *before* the end of the active service period. *Held*, as to (b), that since a discharge from active service is a release from so much of the enlistment contract as requires active service, such obligation can not be renewed without the soldier's consent, which would have to be embodied in a new contract, and therefore a member of the National Guard reserve can be restored to the three year active service status in the National Guard only by discharge and reenlistment.

(58-214, J. A. G., Dec. 8, 1916.)

NATIONAL GUARD: Retention of uniform after muster out, etc.

The title to the clothing furnished at Federal expense to members of the National Guard or Organized Militia and brought with them upon entering the Federal service, as well as the title to clothing which is issued to them while in such service, is in the United States, and such clothing continues to be the property of the United States notwithstanding the muster out, discharge, or furlough to the reserve, of the soldier to whom the clothing has been issued. The practice of charging the soldier with the value of clothing drawn by him against a fixed clothing allowance being merely for convenience in accounting and to incite economy in the use and care of the clothing, such soldier can not legally retain the same after muster out, etc., except as it may be available for his future use as a member of the National Guard.

(72-420.2, J. A. G., Dec. 21, 1916.)

OFFICERS: Second Lieutenant, Quartermaster Corps (pay clerk), not eligible for transfer to Infantry.

A second lieutenant, Quartermaster Corps, commissioned from pay clerk under section 9 of the National Defense Act, requested that he be transferred to second lieutenant of Infantry.

Held, that under existing laws such transfer is not authorized.

(64-240, J. A. G., Dec. 8, 1916.)

OFFICERS' RESERVE CORPS: Assignment of members as disbursing officers when ordered to active duty.

The question was presented whether reserve officers of the Aviation Section of the Signal Corps, ordered to active duty, may legally be assigned to duty as disbursing officers.

Held, that reserve officers, when ordered to active duty in accordance with Sections 37 and 39 of the National Defense Act "for duty with troops," may, while in active service for such duty, be assigned to any duty in connection with such troops to which Regular Army officers serving therewith may be assigned, including duty as disbursing officers.

(6-228.1, J. A. G., Dec. 19, 1916.)

TRAVEL EXPENSES: Officer on duty in connection with National Guard.

Section 67 of the National Defense Act provides for the payment, from the Federal appropriations for the National Guard, of the "actual and necessary expenses incurred by officers and enlisted men of the Regular Army when traveling on duty in connection with the National Guard." In the case of an officer of the Ordnance Department directed to make an inspection of field artillery material in the hands of the National Guard.

Held, that he was entitled to actual expenses of travel, and not mileage, for travel in the performance of such duty, payable from the \$2,000 appropriation for "inspection of material pertaining to Field Artillery and Signal Corps in the hands of the National Guard" (39 Stat., 647.)

(94-210, J. A. G., Dec. 4, 1916.)

UNIFORM: Wearing of, by civilians of Army Young Men's Christian Association.

Section 125 of the National Defense Act prohibits the wearing of the uniform of the Army, Navy or Marine Corps, or any distinctive part thereof, or a uniform any part of which is similar to a distinctive part of the uniform, unless the wearer be a member of the United States Army, Navy or Marine Corps, providing, however, that certain military and quasi-military organizations such as "members of the organizations known as the Boy Scouts of America, or the Naval Militia, or such other organizations as the Secretary of War may designate," shall be excepted from the prohibition.

Held, that, as the organizations that are expressly named as excepted are either military or quasi-military, and in view of the rule of associated words, it was the intention of Congress that the Secretary of War's authority to designate other organizations should be limited to those of a similar character, and that the Secretary of War is, therefore, not authorized to designate the Army Young Men's Christian Association as an organization exempt from the provisions of section 125 of the National Defense Act.

(96-140, J. A. G., Dec. 23, 1916.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

CIVILIAN EMPLOYEES: Right of dredge hand to be returned upon his discharge to place of hire.

A man employed at New Orleans as stoker on a Government dredge and who was discharged at Pensacola, Florida, by reason of the cessation of dredging operations, made claim for the cost of his return passage to New Orleans "under marine law and usage."

Held, that the claimant's rights to return passage to New Orleans must be determined by the agreement which was made with him when he was hired and not under the merchant marine law and usage, and that, therefore, if there was no such provision in the employment agreement, he was not entitled to reimbursement.

(Comp. Treas., Dec. 8, 1916.)

COMMUTATION OF QUARTERS: Officer occupying room in officers' club in public building.

The question was presented whether an officer, not otherwise furnished quarters, who rented and occupied a small room in an officers' club in a public building, was entitled to commutation of quarters.

Held, that such quarters occupied by an officer must be considered public quarters within the meaning of the laws providing for quarters in kind and commutation thereof to officers of the Army. (See 22 Comp. Dec., 27.)

(Comp. Dec., Nov. 28, 1916.)

DISBURSING OFFICERS: Responsibility in re forgery.

While in general a disbursing officer is not responsible for payments based on facts of which he has no knowledge and which are certified to him as correct by the proper administrative officer, this principle does not extend to allowing the disbursing officer credit for a payment made on a forged signature.

(Comp. Treas., Dec. 2, 1916.)

ENLISTED MEN: Allotments of pay, when forfeited.

Where an enlisted man of the Army allots a portion of his pay and thereafter, before the allottee has reduced any such allotments to possession, is sentenced by court-martial to forfeit all pay then due (at time of sentence), such unpaid allotments are included in his pay "then due," and, accordingly, are forfeited by the sentence of the court-martial.

(Comp. Treas., Dec. 14, 1916.)

MEDICAL TREATMENT: In private hospital, Organized Militia.

The Government is not chargeable with the cost of medical treatment furnished by a private hospital to an enlisted man of the

Organized Militia called out in the national defense where the man, at his own request and for his own convenience, was permitted to leave the military hospital to go to his home, and thereafter entered the private hospital on his own responsibility.

(Comp. Treas., Dec. 15, 1916.)

NATIONAL GUARD: Officers entitled to leaves of absence.

An officer of the National Guard included in the President's call for Federal service who has taken the new National Guard oath prescribed by the Act of June 3, 1916, or has been mustered into the Federal service, is entitled to the benefits of the leave laws applicable to officers of the Regular Army from the time that he reported at his company rendezvous in response to the call of the President.

(Comp. Treas., Dec. 4, 1916.)

NATIONAL GUARD: Pay of soldiers rejected by State authorities before muster-in.

A private of the National Guard who responded to the President's call of June 18, 1916, reporting at company rendezvous June 19, was subsequently, before muster-in, examined by the State authorities June 3, 1916, and rejected. The question was submitted whether he was entitled to pay from Federal funds in view of the fact that he was examined and discharged without ever having been presented to the United States mustering officer.

Held, that the soldier was entitled to pay from the date he reported at his company rendezvous in response to the President's call, and that the State authorities being unauthorized after the call to discharge him their action in rejecting the soldier was without legal force and effect, but might be confirmed by the Federal authorities, in which event his right to pay would terminate on the date of his rejection by the State authorities.

(Comp. Treas., Dec. 19, 1916.)

TRANSPORTATION: Land grant; shipment of officers' private mounts.

The transportation rates for the shipment of officers' private mounts which they are required to keep for use in the military service are subject to land grant deduction; the decisions with respect to shipment of officers' household goods, to the effect that the rates therefor are not subject to land grant deductions, not being applicable to horses which are required to be kept for military service.

(Comp. Treas., Dec. 11, 1916.)

BULLETIN 9.

BULLETIN }
No. 9. }

WAR DEPARTMENT,
WASHINGTON, February 2, 1917.

The following digest of opinions of the Judge Advocate General of the Army, for the month of January, 1917, and of certain decisions of the Comptroller of the Treasury and of courts, is published for the information of the service in general
[2526413, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Major General, Chief of Staff.

OFFICIAL:

H. P. MCCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

CIVILIAN EMPLOYEES: Appointment of, as court-martial reporters.

An Army field clerk, salary \$1,400 per annum, was employed as court-martial reporter while on leave of absence and after office hours, but authority for his payment for such services was questioned on the ground that his employment was prohibited by paragraph 987, Army Regulations (1913), and that it would be in violation of the statutes against the payment of double compensation.

Held, that A. R. 987, instead of being a prohibition against the appointment of persons already in the military or civil service as reporters for military courts, and paying them therefor, is an express recognition of the right to do so, subject to the requirements of A. R. 986 with respect to the manner of appointment and rates of pay, and further, that such employment, during a leave of absence or outside of regular office hours, is not in violation of the so-called double compensation statutes (R. S., 1763-1765, and act of Aug. 29, 1916, 39 Stat., 582).

(16-412, J. A. G., Jan. 10, 1916.)

COMMUTATION OF QUARTERS: Officers commissioned in the National Guard.

An officer of the Regular Army, while on detached duty at Philadelphia, was assigned as National Guard mustering officer at Macon, Ga., and while on the latter duty accepted a commission in the National Guard, but continued on duty as mustering officer for several weeks thereafter. After joining his regiment (National Guard) in pursuance of War Department orders, he claimed commutation of

quarters and the stabling of his horse at Philadelphia on the ground that he had not been relieved from his detached duty status at Philadelphia.

Held, that when an officer is assigned to a regiment and ordered to join that regiment for duty, his station becomes that of the organization to which he is thus attached, and that in the instant case the officer could not properly be regarded as continuing in his detached duty status at Philadelphia, after he was relieved from duty as mustering officer at Macon and ordered to join his regiment.

(58-720, J. A. G., Jan. 19, 1917.)

CONTRACTS: Bailment.

In the case of a contract for the manufacture from cloth furnished by the Government of uniform clothing, the building in which the work was being done having been destroyed by fire, damaging the materials furnished by the Government, on the question whether or not the contractor could be charged with the loss, in the absence of a provision making him responsible for the safety of the property,

Held, that if the loss occurred without fault or negligence on the part of the contractor, as stated, it must fall on the Government as owner of the property; that in the absence of express provisions in the contract, he is not liable as an insurer of the property of the bailor, but is simply liable for the proper care of the same while in his custody. See 6 Corpus Juris, 1110, and authorities there cited.

Held further, that the contractor was legally entitled to be paid for the garments which were completed and ready for delivery as well as for those which were completed and accepted; and that the contractor should be allowed a reasonable time for the completion of the contract after materials are furnished to replace those destroyed by the fire. On the question whether a clause in the contract making the contractor "liable for any loss of or damage to any of the materials furnished by the Quartermaster Corps while in his possession," would cover a loss by fire,

Held, that such a clause would clearly make the contractor liable for loss by fire; that it would make him liable as insurer of the property except for causes falling within the well-recognized exception of losses by acts of God or a public enemy; and that a loss of the property by fire, unless the result of lightning, would not be within this exception. See 4 R. C. L., 714.

(76-700 and 76-333, J. A. G., Jan. 3 and 23, 1917.)

CONTRACTS: Collateral to secure performance.

Certain questions were submitted as to the acceptance of Government, municipal, or corporate bonds, or other collateral, to secure contracts for aeroplanes and aeroplane equipment, it being stated that owing to conflicting claims as to patent rights, the rates of surety companies on bonds to secure such contracts were excessive.

Held, that there is no statute which limits the discretion of the Secretary of War as to the kind of security which he may require as to this class of contracts; that the Secretary of War may, there-

fore, authorize the acceptance of collateral as proposed; and that the instrument providing for such security should define the conditions under which the deposit is made, provide for the withdrawal of the particular bonds and the substitution of others in the event of such withdrawal becoming desirable; and should clearly define the rights of parties in case it becomes necessary to dispose of the collateral to satisfy any claims of the Government under the contract

(12-120, J. A. G., Jan. 11, 1917.)

CONTRACTS: Construction.

In the case of a contract for supplying water at varying rates for different quantities, where it was not stated that the rates for the respective quantities should apply monthly, but a discount was provided for bills "paid by the 10th of each month,"

Held, that the contract should be construed as providing for monthly payments at prescribed rates for the respective quantities furnished during the month; it appearing further that this construction would make the payments conform to the "regular tariff as charged to all consumers."

(76-700, J. A. G., Jan. 23, 1917.)

DETACHED SERVICE: Officer on duty as Division Adjutant.

An Infantry officer of the Regular Army with the rank of major, having served as acting adjutant of a National Guard Infantry Division from October 15 to November 2, 1916, inquired whether such duty was to be regarded as duty with troop organizations within the meaning of the detached service law.

Held, that such service was duty with organizations of troops within the meaning of the detached service law, the case being governed by a former ruling dated June 18, 1914, in which it was held with reference to the detached service legislation of April 27, 1914, that "when, therefore, a field officer of the line performs the regular and normal duties of a brigade adjutant, he is on duty and actually present for duty with a command composed of not less than two troops, batteries, or companies of that branch of the Army in which the officer holds his commission, provided, of course, the brigade be a brigade of his branch of the service."

(6-124.3, J. A. G., Dec. 6, 1916.)

ENLISTED MEN: Appointment as cadets, U. S. Military Academy.

An enlisted man with more than one year's service in the National Guard inquired whether such service could be taken into consideration in determining his eligibility for appointment from the Regular Army as a cadet to the U. S. Military Academy under section 2 of the act of May 4, 1916, which provides:

"That the President is hereby authorized to appoint cadets to the United States Military Academy from among enlisted men in number as nearly equal as practicable of the Regular Army and the

National Guard between the ages of nineteen and twenty-two years who have served as enlisted men not less than one year, to be selected under such regulations as the President may prescribe."

Held, that to satisfy the requirements of the statute the prior service must have been rendered in that branch from which the application is made.

(6-142, J. A. G., Jan. 18, 1917.)

ENLISTED MEN: Appointment of sergeants, limited warrant, in provisional ambulance companies.

A lance corporal in a provisional ambulance company, with the Mexican Punitive Expedition, having passed an examination for appointment as sergeant, Medical Department, limited warrant, the question was presented as to the legality of making such appointment.

Held, that such appointments may properly be made in provisional ambulance companies the organization of which has been authorized or approved by the Secretary of War.

(6-227.1, J. A. G., Nov. 17, 1916.)

ENLISTED MEN: Lance corporals.

The question was presented as to the propriety of appointing a lance corporal, in an Infantry supply company, from the grade of wagoner, in view of the fact that the personnel of such company does not include the grade of private.

Held, that such appointment may not be made, so long as paragraph 272, A. R., 1913, authorizes only "privates" to be so appointed.

(6-151.1, J. A. G., Jan. 12, 1917.)

MILITARY ACADEMY: Appointment of cadets.

The question was presented whether enlisted service in the Navy may be counted in determining the eligibility of an enlisted man in the Regular Army for appointment to the Military Academy under the provisions of section 2 of the act of May 4, 1916, authorizing appointment as cadets of enlisted men of the Regular Army and National Guard "who have served as enlisted men not less than one year."

Held, that the statute contemplates a year's service in one or the other of the forces named, and that service as an enlisted man in the Navy could not be counted for the purposes of the act.

(6-141, J. A. G., Dec. 4, 1916.)

NATIONAL GUARD: Enlisted men, discharge.

An enlisted man of the New York National Guard had served, on March 15, 1915, five years, the term of his enlistment, after deducting the time he was "dropped," which under the provisions of the State law may be done without terminating service. Not having been dis-

charged at the time of the call of the President for the muster of his organization into the Federal service, he responded to the call and, on July 1, 1916, was mustered into the service of the United States.

Held, on a claim made for his discharge, that this soldier should be credited with the whole of his term which he served in the National Guard, less the periods during which he was "dropped," and that, having served more than six years, he was entitled to a discharge from the service.

(58-214, J. A. G., Jan. 18, 1917.)

NATIONAL GUARD: Organization.

Section 60 of the National Defense Act provides:

"The organization of the National Guard, including the composition of all units thereof, shall be the same as that which is or may hereafter be prescribed for the Regular Army, subject in time of peace to such general exceptions as may be authorized by the Secretary of War."

Request was made on behalf of medical officers of the National Guard in the service of the United States that the Secretary of War, under his power to authorize general exceptions, permit them to hold the office of captain and to receive the pay of that office, irrespective of their length of service as medical officers of the National Guard.

Held, that the word "exception" in section 60 is used in the sense of "exclusion," that it does not include "substitution," that the statute authorizes modification only by way of exclusion, and that the request could not, therefore, be granted.

(58-213.2, J. A. G., Jan. 13, 1917.)

NATIONAL GUARD: Title to uniform clothing.

The question of the title of enlisted men of the National Guard or Organized Militia to the uniform clothing issued to them while in the Federal service was again submitted with reference to a communication from the adjutant general of a State, in which it was contended that upon the discharge or furlough to the Reserve of a soldier of the Regular Army, the clothing issued to him becomes his private property, and that the same rule should apply to the enlisted men of the National Guard upon their release from Federal service.

Held, that it is clear from the statutes forbidding the sale of uniform clothing, particularly section 35 of the Criminal Code, and the decisions of the courts thereunder, that the uniform clothing issued to a soldier is the "public property of the United States;" that a soldier of the Regular Army, upon his discharge or furlough to the Reserve, does not acquire any legal title thereto; and that by section 125 of the National Defense Act of June 3, 1916, he is only permitted to wear the uniform to his home within three months after his discharge.

Held further, that as a soldier of the National Guard or Organized Militia is not finally discharged, upon his muster-out of the Federal service, the clothing in his possession upon release from

such service, should be available for his use while a member of the National Guard or Organized Militia after his muster-out; and that settlement with the State should be made upon the basis of replacing the clothing which was brought with the State organizations into the Federal service by the clothing in the possession of the same upon their muster-out.

(72-420.2, J. A. G., Dec. 21, 1916.)

OFFICERS' RESERVE CORPS: Eligibility of officers and enlisted men of Regular Army and National Guard for membership in.

An officer of the National Guard asked whether he was eligible for appointment in the Officers' Reserve Corps, and, if eligible, whether he might continue in the active service of the United States as an officer of the National Guard after his appointment as an officer of the Officers' Reserve Corps.

Held, that since the purpose for which the Officers' Reserve Corps is organized is to provide a reserve of officers, it is a logical conclusion that such a reserve should not be composed of officers already available as such for the military service of the United States; and that the regulation made by the President eliminating from consideration for appointment in the Officers' Reserve Corps officers of the National Guard and of the Regular Army, contained in the first sentence of Section III of General Orders No. 42, War Department, July 28, 1916, and reading—

"No applicant will be examined who is an officer of the Regular Army on the active list, or the National Guard, or who is not a citizen of the United States"; is made under ample authority of statute and is effective to exclude from appointment in the Officers' Reserve Corps both officers of the National Guard and officers of the Organized Militia not yet transformed into the National Guard, as well as officers of the Regular Army.

With respect to the third paragraph of section 37 of the National Defense Act, providing that—

"All persons now carried as duly qualified and registered pursuant to section twenty-three of the act of Congress approved January twenty-first, nineteen hundred and three, shall for a period of three years after the passage of this act, be eligible for appointment in the Officers' Reserve Corps in the section corresponding to the arm, corps, or department in which they have been found qualified, without further examination, except a physical examination, and subject to the limitations as to age and rank herein prescribed: *Provided*, That any person carried as qualified and registered in the grade of colonel or lieutenant colonel pursuant to the provisions of said act on the date when this act becomes effective may be commissioned and recommissioned in the Officers' Reserve Corps with the rank for which he has been found qualified and registered. * * *

Held, that while this provision of the statute declares the persons therein described to be eligible for appointment in the Officers' Reserve Corps, it is not a mandate for their appointment; and, if for reasons of national policy the President may decide, as it is apparent he has decided, that persons holding commissions in available military forces of the United States shall not also be commissioned in the Officers' Reserve Corps, the provision of section 37 of the national

defense act just quoted is not violated. The eligibility of such officers is not interfered with, though, for the reason that they already bear a relation to the Government which is equivalent to that which would be established by their appointment in the Officers' Reserve Corps, and which renders their appointment unnecessary for the attainment of the purpose of the law creating the Officers' Reserve Corps, the President has, in his discretion, determined and ordered that they shall not be appointed.

Held further, that enlisted men of the Regular Army or National Guard who are found qualified, upon examination, may be commissioned in the Officers' Reserve Corps without impairment of their enlisted status, and that officers of the Officers' Reserve Corps may, if otherwise eligible, enlist in the Regular Army or National Guard.

(58-241, 6-150, J. A. G., Aug. 30, 1916.)

(58-241, J. A. G., Aug. 30, 1916, and Dec. 27, 1916.)

OFFICERS' RESERVE CORPS: Eligibility of Philippine Scouts for appointment in.

The question was presented whether under the laws and regulations governing the Officers' Reserve Corps an officer of Philippine Scouts is eligible for appointment. General Orders No. 32, War Department, 1916, directs that:

"No applicant will be examined who is an officer of the Regular Army, * * *

Held, that an officer of Philippine Scouts is an officer of the Regular Army in the sense of the regulation and is not eligible for appointment in the Officers' Reserve Corps.

(6-250, J. A. G., Jan. 19, 1917.)

OFFICERS' RESERVE CORPS: Purchase of subsistence stores by members of.

Upon a request for information from a member of the Officers' Reserve Corps on the inactive list as to whether he was entitled to the privilege of purchasing subsistence stores under paragraph 1239, A. R., 1913,

Held, that sales of Government property to members of the Officers' Reserve Corps on the inactive list should be limited to those articles of clothing and equipment which would be required by them in the public service in case of their being called on for active duty, and that as subsistence stores do not fall within this category, their sale to members of the Officers' Reserve Corps not in active service is not authorized.

(6-301, J. A. G., Jan. 15, 1917.)

OFFICIAL PAPERS: Copies of, to support claims.

On application by attorneys for a copy of an official report of a board of officers respecting the use and occupation of private lands for military purposes,

Held, that in view of the statute which prohibits officers from aiding or assisting in the prosecution or support of any claims against the Government (section 109, Criminal Code), as well as of the pro-

visions of paragraph 824, Army Regulations, on the subject, and in line with the practice common to the several Executive Departments, the request should not be complied with—an additional reason being that the Department of Justice would be called upon to defend a suit based on the claim, and might be embarrassed by the conclusions of the board.

(66-124, J. A. G., Jan. 12, 1917.)

POST EXCHANGES: Settlement of disputes between exchanges and creditors.

A post exchange of a National Guard regiment in the service of the United States purchased certain supplies, which were returned to the vendor for credit on account when the regiment was ordered mustered out of the Federal service. The vendor refused to accept the goods returned, asserting that they were not purchased with that understanding, while the post exchange officer insisted that all the exchange's goods were purchased with the distinct understanding that they were to be returned in the event of the muster-out of the regiment. The vendor appealed to the War Department.

Held, that it is not the policy of the War Department to interfere in the contractual relations between post exchanges and their creditors where there is a bona fide dispute which appears to be a proper case for judicial determination, and that no action could be taken in the instant case for the further reason that the regiment to which the post exchange belonged had been mustered out of the Federal service and its officers had passed primarily beyond the control of the War Department.

(40-100, J. A. G., Jan. 2, 1917.)

PUBLIC PROPERTY: Liability of ship owner for loss or damage of, at sea.

In the case of two Army mules lost at sea from a commercial vessel upon which they were being shipped by the Quartermaster Corps, the steamship company claimed exemption from liability on the ground that the loss was due to dangers of the sea, the mules having been washed overboard from the deck, where they were stowed in cattle stalls when the vessel "shipped a succession of heavy seas."

Held, that under the Harter Act (27 Stat., 445) it was incumbent upon the vessel owner to show that it exercised due diligence to make the vessel seaworthy before commencement of the voyage, including the deck structure for securing the mules, and that in the absence of proof of the exercise by the company of due diligence to make the vessel in all respects seaworthy, as required by the Harter Act, the company could not be exempted from liability for the loss.

(76-700, J. A. G., Jan. 22, 1917.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

CLAIMS: Additional payment after final settlement, jurisdiction.

Upon making payment under a contract for furnishing a machine lathe according to specifications, the sum of \$6.07 was deducted for

liquidated damages for delay. Both the Government and the contractor understood at that time that the deduction was proper, but subsequently it was found by the contractor that the delay, which occurred in the subcontractor's manufactory, was due to a strike and was within the exception against liquidated damages under the contract. Upon presentation of claim for the amount deducted,

Held, by the comptroller, that final settlement having been made with the contractor in accordance with the facts as understood at the time of settlement, the voucher submitted constituted a claim for additional payment which could not properly be paid by the War Department but should be sent to the auditor for the War Department for development of the facts and settlement.

(Comp. Treas., Jan. 18, 1917.)

PAY AND ALLOWANCES: Receiving salaries of two positions.

Section 6 of the act of May 10, 1916, as amended (39 Stat., 120, 582), prohibits any person from receiving the pay of two Federal positions "when the combined amount of said salaries exceeds the sum of \$2,000 per annum," but it is expressly provided that the act shall not apply to retired officers and enlisted men or to officers and enlisted men of the Organized Militia and Naval Militia. In the case of a quartermaster clerk who held a commission in the National Guard and was mustered into the Federal service,

Held, that upon his muster into the Federal service he ceased to be a member of the National Guard, within the meaning of the Act of May 10, 1916, and became an officer of the Army and as such was subject to the prohibition of that act.

(Comp. Treas., Jan. 3, 1917.)

DECISIONS OF THE COURTS.

(Digests prepared in the office of the Judge Advocate General.)

CONTRACTS: Correction of mistake.

In the case of a Navy Department contract for furnishing coal, delivered at Manila Bay from American ports, the terms were settled by the Bureau of Equipment, and it was agreed that a certain important clause appearing in the printed specifications upon which proposals were asked should be omitted from the contract. Through a clerical inadvertence, however, the clause was left in the requisition sent to the Bureau of Supplies and Accounts, and the contract was drawn embodying it and signed by the contractor without careful reading. Thereafter, when the mistake was discovered, the Navy Department notified the contractor that the contract would be amended by the omission of the clause, but the accounting officers refused to recognize the amendment. In a suit for the reformation of the contract,

Held, by the Supreme Court, that the contractor was entitled to have the written contract corrected, the court saying: "It is the contract that has been made through the agent authorized to make it

that is to be reduced to writing and if a clerk or some other agent makes a mistake we perceive no reason why the writing should not

be made to conform to the fact. * * * There was a mistake made by a clerk in not striking out a printed clause from that requisition. It is as if a principal, after making the agreement, had taken a printed form and forgotten to draw his pen through the words. The failure of the contractor to read before signing an instrument, the terms of which he had seen in print, is not enough to debar him from seeking relief."

In reference to the contractor's further claim for the recovery back of port charges levied against his vessels at Manila on the ground that the Philippine tariff act of March 3, 1905, exempts from such charges "a vessel belonging to or employed in the service of the Government of the United States,"

Held, that the words quoted do not mean every vessel that carries a ton or a cargo of coal for the Government but only one that is under the control of the United States, and is an agency of the Government, and that therefore the contractor's vessels did not come within the meaning of the provision.

(*Ackerlind v. United States*, decided by U. S. Sup. Ct., Apr. 3, 1916.)

PUBLIC PROPERTY: Damage to.

In a suit by the United States in admiralty against the owner of a vessel for injuries to a Government cable,

Held, by the court, that as the evidence showed that the damage was the result of negligence in the management of the vessel, there should be a decree for the Government unless the claim of the owner of the vessel that, owing to the character of the property injured, admiralty was without jurisdiction, was sound. Upon the latter point, *Held*, that under the authorities the location of the cable is controlling and gives it a maritime relation; and that since the injuries were done in the operation of navigation to a cable while occupying some portions of the navigable channel, the matter came within the admiralty jurisdiction.

(*United States v. North-German Lloyd*, District Court, So. Dist. of N. Y., Jan. 13, 1917.)

BULLETIN 15.

BULLETIN }
No. 15. }

WAR DEPARTMENT,
WASHINGTON, March 24, 1917.

The following digest of opinions of the Judge Advocate General of the Army, for the month of February, 1917, and of certain decisions of the Comptroller of the Treasury and of courts, is published for the information of the service in general.

[2526413 A—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Major General, Chief of Staff.

OFFICIAL:

H. P. MCCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ABSENCE: Stoppage of pay.

Should a stoppage of pay be made against a soldier for the time he is absent from duty under test to ascertain whether he is suffering from disease resulting from his own misconduct?

Held: Soldiers, presumably not diseased, ordered into hospital for the purpose of ascertaining whether they have diseases due to their own misconduct, should not be subject to stoppage for absences so occasioned when the test does not disclose the presence of such diseases, and this should be the rule regardless of the suspicion that may be engendered by a record of previous but presumably eradicated disease.

(34-052, J. A. G., Feb. 21, 1917.)

ALLOWANCES: Issue of shelter tents to officers on memorandum receipt.

The War Department interpretation of pertinent statutes is that the issue of Government property to officers in cases not specifically authorized by law is a violation of Revised Statutes 1269 which forbids allowances to officers except as provided by statute. The question is raised whether the issue of shelter tents to officers on memorandum receipt is forbidden by Revised Statutes 1269.

Held: The legal intendment of the word "allowance" imports compensation. That which is given a man for the primary purpose of his advantage as a man is an allowance; that which is intrusted to him to use for the primary purposes of the Government is not an allowance. Shelter tentage, and in general the war material of the Government, which is intrusted to an officer on memorandum receipt,

not as compensation but to promote the performance of his military duty, is not an allowance, and so may be issued without express statutory authority.

(80-130, J. A. G., Feb. 14, 1917.)

BONDS: Cancellation of.

Upon the question raised as to the authority of the Secretary of War to surrender a bond, which had been accepted by him in the exercise of his discretion under a statute, upon the city furnishing a bond in a reduced penalty deemed sufficient for the purpose.

Held, in accordance with the practice of the several executive departments, that, in the absence of authority from Congress, executive officers have no authority to surrender or release obligations of the United States; that upon the acceptance of the bond the United States acquired certain rights as obligee; and that the principle is that no executive officer, without authority of law, can surrender or waive such rights. While the United States has the same powers in respect to contracts that private persons have (*U. S. v. Smith*, 194 U. S., 218) the principle is that its officers or agents do not possess plenary powers (8 Comp. Dec., 106), and can not, without authority from Congress, surrender or waive the rights of the Government (citing 4, Opin. Atty. Gen., 312). While the Secretary of War may, if he deems the security insufficient, require further security, he may not, therefore, without authority of Congress, release security which has been accepted.

(12-332, J. A. G., Jan. 3, 1917.)

CIVIL AUTHORITIES: Expenses for detention of soldier.

Where a soldier absent without leave was arrested by the chief of police of a town, who notified the military authorities thereof, and was instructed to hold him until the arrival of a guard sent to conduct the soldier back to his post,

Held, that the chief of police was entitled to reimbursement for expense incurred by him in connection with the arrest and detention of the soldier, such arrest having been ratified by the request of the military authorities that he be held, and that there being no other appropriation available therefor payment could be authorized by the Secretary of War from the appropriation for contingencies of the Army.

(26-200, J. A. G., Jan. 3, 1917.)

CONTRACTS: Advertising for bids.

The city of New York had appropriated \$95,000 to fill in certain marsh lands which it held adjacent to other marsh lands owned by the Government on a military reservation in New York Harbor. It offered to enter into a contract with the Government to fill in at the same time, and at the actual cost of the work, the said Government marsh lands, the estimated cost of the work required to be done on

the Government reservation being but \$2,500, about one-half of what it was estimated that the work would cost if bids should be called for and the contract let to the lowest bidder. The question submitted was whether, in view of the increased cost of the work, if done under contract with the lowest bidder, advertising could be dispensed with and a contract entered into with the city under the terms above stated for doing the work.

Held, in view of the comparatively large amount of work to be done by the city and the necessary expense attendant upon bringing a plant to the site of the work, that if the city will do the work required by the War Department at cost, no possible advantage could be gained by the Government through advertising; that, in other words, advertising under such a situation would be useless, as it would be impracticable thereby to secure competition, and hence there would be no legal objection to entering into a contract with the city for doing the work at the price per cubic yard which it would cost the city.

(76-124, J. A. G., Feb. 7, 1916.)

CONTRACTS: Construction.

Where a contract was made for furnishing such quantities of bituminous coal "as may be required" for use at certain designated posts during the fiscal year, and thereafter the National Guard troops were called into the active service by the President, resulting in greatly increased quantities of coal being required at said posts over the estimated requirements,

Held, that the contract having been made prior to the calling out of the militia troops, it did not contemplate the possibility of the extraordinary demands incident thereto, and the excess requirements of the posts due to the presence there of the militia troops were therefore outside of the obligations of the contract and should be provided for under a separate contract or by open-market purchase, according to the exigencies of the service. The contractor having asked to be relieved from the obligation of furnishing more than the estimated contract requirements due to the increased market price of coal,

Held, that, while he was under no obligation under his contract to make further deliveries in future, yet, in respect of such deliveries as had already been made, the same having been called for and delivered as a contract obligation, the department could grant no relief.

(76-600, J. A. G., Feb. 14, 1917.)

DISCHARGE: Effect of unauthorized discharge.

An officer of the National Guard of Massachusetts was appointed mustering officer for the special purpose of mustering out of *Federal service* a named enlisted man of the National Guard of Massachusetts. Through misunderstanding, a blank for discharge from the *Army of the United States* was completed and delivered, citing the mustering officer's authority and purporting to sever the connec-

tion of the enlisted man with the Army of the United States. Did this document discharge the soldier from the National Guard?

Held: The discharge operated only to muster the man out of Federal service. As a discharge from the Army, it was not merely erroneously given; it was unauthorized in law and null. It could not have been effective to sever his relation with the National Guard for two reasons—because such an effect was unauthorized in law; because the mustering officer had been delegated no power to consummate such a severance even if it had been authorized.

(58-052, J. A. G., Feb. 24, 1917.)

EX-OFFICERS: Recommissioning.

Section 24 of the national-defense act provides: "That the President may recommission persons who have heretofore held commissions in the Regular Army and have left the service honorably after ascertaining that they are qualified for service physically, morally, and as to age and military fitness." Inquiry was made whether an ex-officer who had been discharged for failure to pass an examination for promotion, under the act of October 1, 1890 (26 Stat., 562), could be recommissioned under section 24 (*supra*).

Held, that, since section 24 requires "military fitness," and since an officer discharged under the act of 1890 has had his military fitness tested in the most complete manner possible, section 24 does not contemplate or authorize the recommissioning of such ex-officer.

(64-221.4, J. A. G., Feb. 13, 1917.)

FIELD CLERKS: Heat and light allowances.

The question was presented whether Army field clerks and field clerks, Quartermaster Corps, were entitled to heat and light allowances in public quarters which they are authorized to occupy. Such clerks who have had the requisite service prescribed in the act of August 29, 1916, creating those positions are by the statute given "the same allowances, except retirement, as heretofore allowed by law to pay clerks, Quartermaster Corps."

Held, that it having been definitely determined that no provision was made by law for furnishing pay clerks with fuel and light at public expense in public quarters (Buls. of 1915; No. 5, p. 5, and No. 21, p. 7), it follows that the field clerks are not entitled to such allowances. As in the case of pay clerks, Congress had made specific provision for *commutation* of heat and light, but no provision has been made for furnishing these allowances in kind.

(72-310.3, J. A. G., Feb. 8, 1917.)

MEDALS OF HONOR: Findings of board under section 122 of national-defense act.

Certain questions were submitted as to the construction of section 122 of the national-defense act, approved June 3, 1916, providing for the appointment of a board of retired officers to investigate and

report upon past awards or issues of the so-called congressional medals of honor by or through the War Department.

Held, that as the statute expressly requires that "in any case in which the board shall find and report" that the medal was issued for any cause other than that specified in the statute "the name of the recipient of the medal so issued shall be stricken permanently from the medal-of-honor list," the Secretary of War is without discretion to review or control the findings of the board; that the law requires from him administrative action (1) to cause the name of the recipient of the medal which the board finds was improperly issued to be stricken "permanently from the official medal-of-honor list"; and (2) if the recipient "shall still be in the Army" to require him to "return said medal to the War Department for cancellation"; and that the act requires the Secretary of War to proceed at once to give execution to the findings of the board in these respects and gives him no authority to postpone action.

Held further, that although the provision making it a misdemeanor for the recipient of a medal of honor which the board finds was improperly issued to wear or publicly display the same fails to prescribe a penalty for the offense, nevertheless the statute does not charge the Secretary of War with any duty to enforce this provision.

(46-112, J. A. G., Feb. 7, 1917.)

MEDICAL DEPARTMENT: Rank of sergeants, first class.

Section 3 of the act of March 1, 1887 (24 Stat., 435), provides that—

"Hospital stewards * * * shall have rank with ordnance sergeants and be entitled to all allowances pertaining to that grade"; the act of March 2, 1903, that—

"The rank * * * of sergeants, first class, * * * shall be the same as now provided by law for hospital stewards * * *"; and by section 10 of the national defense act the term "Hospital Corps" is superseded by the term "enlisted force of the Medical Department," comprising all grades formerly existing in the Hospital Corps and several new grades, and provision is made that—

"The enlisted men of the Hospital Corps who are in active service at the time of the approval of this act are hereby transferred to the corresponding grades of the Medical Department established by this act."

Held, that there is now no law requiring sergeants, first class, Medical Department, to be graded with ordnance sergeants, the provision to that effect having been omitted from the national defense act, which created anew the grade of sergeant, first class, Medical Department; and that, therefore, it is not in contravention of statutes to rank sergeants, first class, Medical Department, below ordnance sergeants in amending paragraph 9, Army Regulations.

(6-227.1, J. A. G., Jan. 13, 1917.)

NATIONAL GUARD: Clothing.

The governor of a State, referring to the opinion of the Judge Advocate General dated November 4, 1916 (Bul. 53, W. D., 1916), with reference to charging the clothing in the possession of the

militia on their muster into the Federal service against the initial allowance of the men, submitted the following questions:

(a) Whether the interpretation of the law as given in the said opinion is not in violation of paragraph 460, Army Regulations?

(b) Whether it does not have the effect of requiring the full price of clothing issued to the State and brought with the National Guard or Organized Militia into the Federal service to be charged against the initial allowance of the enlisted men?

Held, with reference to (a), that the requirement as stated in the said opinion of the Judge Advocate General is contrary to the terms of the regulation, but that the law requires that the militia while in the Federal service *shall receive the same pay and allowances* as Regular troops, and as Regular troops are charged with the clothing supplied to them on enlistment, it follows that the clothing with which the militia is supplied when entering the Federal service, the clothing having been furnished by the Government, must be charged to them; that the requirement of the regulation, being inconsistent with the law, must give way to the law.

Held, with respect to (b), that the opinion of this office under consideration does not require the clothing to be charged at the full issue price of the same, but that if the clothing is worn it should be charged at a reduced price fixed by a surveying officer in view of its condition at the time.

(72-420.2, J. A. G., Dec. 15, 1916.)

NATIONAL GUARD: Property shortages.

On the question as to the action which should be taken to relieve the hardships involved in holding up the final pay accounts of officers of the National Guard or Organized Militia pending the determination of their responsibility for shortages of public property.

Held, that the question of the accountability for public property is one to be determined by the Secretary of War under the act of March 29, 1894 (28 Stat., 457); that there is, therefore, no legal objection to modifying the regulations so as to relieve the hardships complained of so far as practicable; and that such hardships can be relieved, with due regard to the interests of the United States, by modifying the regulations so as to permit of settlement as follows:

(a) As to officers of the Organized Militia or National Guard who, after their muster out, have the status of officers of the National Guard as organized under the act of June 3, 1916, final payment to be made as soon as the status of the complainant as an officer of the National Guard is fixed—the Government being secured by the right to withhold pay accruing to the officer as an officer of the National Guard for any shortages in respect of which it may be finally determined he is chargeable.

(b) As to officers of the Organized Militia who, upon their muster out, do not assume the status of officers of the National Guard as organized under the act of June 3, 1916, partial payments be made withholding only the amount for which the preliminary report indicates that the officer is properly accountable, such partial payment to be made when the complainant has signed a certificate to the effect that all property for which he is accountable or responsible has been

used for the benefit of the Government, etc. Final payment should be withheld until the accountability of the officer is finally determined. (58-700, J. A. G., Feb. 15, 1917.)

NATIONAL GUARD: Legality of muster out.

Where an officer of the headquarters of a National Guard brigade was mustered out in Texas, following the return of a portion of the brigade to New York for muster out, leaving only one regiment on duty in Texas, on the question whether it was legal to muster him out in Texas instead of returning him to his home station for muster out.

Held, that the papers indicate that the muster out was pursuant to an order of the Secretary of War issued because the brigade headquarters, to which the officer in question belonged, was no longer authorized, the brigade being reduced by the muster out of a part thereof to a single regiment, and that while the order should have included the brigade headquarters, there could be no question of the legality of the muster out of the officer in Texas under the orders issued in this case.

(58-301, J. A. G., Feb. 20, 1917.)

NATIONAL GUARD ORGANIZATION: General exceptions.

Section 60 of the national-defense act provides:

"The composition of the National Guard, including the composition of all units thereof, shall be the same as that which is or may hereafter be prescribed for the Regular Army, *subject in time of peace to such general exceptions as may be authorized by the Secretary of War.*"

Request was made on behalf of a number of medical officers of the National Guard in Federal service who had been denied the pay of captain, on the ground that they had not had the required number of years of service, that the Secretary of War, under his power given by the foregoing statutes to make "general exceptions," authorize them to be recognized as captains and to receive the pay of that grade.

Held, that the term "exception," in section 60, is used in the sense of exclusion, that it does not include substitution, that the Secretary of War could only authorize modification by way of exclusion, and that the request could not, therefore, be granted.

(58-210, J. A. G., Jan. 13, 1917.)

NATIONAL GUARD RESERVE OFFICERS: Appointment in Regular Army.

Inquiry was made whether commissioned officers of the National Guard Reserve are included in the expression "commissioned officers of the National Guard," designated by section 24 of the national-defense act as the fourth class in the order of appointment to vacancies in the grade of second lieutenant.

Held, that section 69, relating to the period of enlistment, and section 70, prescribing the oath of enlistment, as well as other sections of the national-defense act, indicate clearly that the term "National Guard" includes an active and a reserve force, and that unless the context indicates a different meaning the term "National Guard" should be construed as including the National Guard Reserve. The question was answered in the affirmative.

(64-213.3, J. A. G., Feb. 3, 1917.)

POSSE COMITATUS: Regular officers serving under commissions in National Guard.

On the question raised as to whether section 15 of the act of June 18, 1878 (20 Stat., 152), forbidding the employment of any part of the Army as a *posse comitatus* or otherwise to enforce the laws, except where expressly authorized by Congress, would preclude an officer of the Regular Army serving under a commission in the National Guard from serving with the National Guard in case of an emergency causing the governor to call out the same.

Held, that as section 100 of the national-defense act, approved June 3, 1916, authorizes officers of the Regular Army detailed to duty with the National Guard to "accept commissions in the National Guard, with the permission of the President, determinable in his discretion," and as section 61 of the same act recognizes the rights of the States "in the use of the National Guard within their respective borders in time of peace," the service of the regular officer under his commission as an officer of the National Guard would not be a violation of the *posse comitatus* act; that while holding a commission in the National Guard under authority of the act of June 3, 1916, he would be under orders of the governor of the State, and for the time being his status as a regular officer would be in abeyance; and that as an officer of the National Guard he would be subject to the lawful orders of the governor of the State.

(64-312.4, J. A. G., Jan. 18, 1917.)

PUBLIC PROPERTY: Lease of.

Bids having been invited for the lease of grazing privileges on a target and maneuver reservation, under the act of July 28, 1892, on the question raised whether it would be legal to pass over the highest bid in favor of the alternative bid of another bidder containing conditions materially different from those stated in the advertisement,

Held, that, if the legality of the proposed action be tested by the decisions under statutes regarding advertising in the making of Government contracts, it would not be legal to accept the alternative bid, but that as the Secretary of War in making leases under this statute may advertise or not, in his discretion, it would not be illegal to accept the alternative bid. Upon submission of the question to the Secretary of War for decision as to the course to be adopted in this class of cases, it was ordered that the highest legal bid be accepted after advertising in the present and future cases.

(80-722, J. A. G., Feb. 10, 1917.)

RETIRED OFFICERS: Members of courts-martial.

A retired officer having, by direction of the Secretary of War, been detailed as quartermaster under the act of April 23, 1904 (33 Stat., 264), providing that—

"The Secretary of War may assign retired officers of the Army, with their consent, to active duty in recruiting for service in connection with the Organized Militia in the several States and Territories upon the request of the governor thereof, as military attachés, upon courts-martial, courts of inquiry and boards, and to staff duty not involving service with troops," was appointed, by an officer exercising general court-martial jurisdiction, as member of a general court-martial.

Held, that the act of 1904 contemplates that the Secretary of War shall exercise his discretion with respect to the retired officer and the particular active duty to which such officer shall be assigned; that it does not provide for a general active-duty status; and that if it is desirable to have the officer act as a member of a court-martial the Secretary of War may assign him to active duty upon courts-martial in addition to his duties as quartermaster.

Held further, that although the appointment of the officer as a member of the court was irregular the trials on which he sat as a member should not be regarded as invalid, since he was competent in law to sit as a member of a court-martial.

(88-613, J. A. G., Jan. 24, 1917.)

VETERINARY CORPS: Credit for "governmental service."

Upon an inquiry whether an assistant veterinarian appointed under the provisions of section 16 of the national defense act might receive credit for service in the Bureau of Animal Industry as "Governmental service," within the meaning of that section,

Held, that since the national defense act as a whole relates to matters under the control of the War Department, it must be assumed that any term employed in the section above referred to which describes service in a more general way than the term "military service" must be construed to cover other service under the War Department only, rather than to extend the operation of the statute to other departments of the Government, and therefore beyond the general purview of the act; and that, therefore, service in the Bureau of Animal Industry can not be counted as "Governmental service" within the meaning of section 16 of the national defense act.

(6-133, J. A. G., Jan. 26, 1917.)

VETERINARY CORPS: Persons included in.

Upon inquiry whether veterinarians of Cavalry, Field Artillery, and the Quartermaster Corps who have been recommended for commissions in the Veterinary Corps established by section 16 of the act of June 3, 1916, are to be considered members of the Veterinary Corps pending the issue of their commissions,

Held, that the language of the section referred to defines the Veterinary Corps as consisting of "said veterinarians and assistant veterinarians," and these words can relate only to the veterinarians and assistant veterinarians whose appointments have been provided for in the preceding clauses. The words, "including veterinarians now in the service," are employed in the section only for the purposes (1) of limiting the number of officers who may be appointed veterinarians and assistant veterinarians under the terms of the section, and (2) of indicating that the discharge of veterinarians then in the service was not required; and do not have the effect of including the "veterinarians now in the service" in the Veterinary Corps, which the section plainly constitutes through new appointment.

(6-133, J. A. G., Jan. 26, 1917.)

SUPPLY COMPANY: Commanding officer of.

A captain of Infantry was appointed quartermaster of his regiment on March 17, 1913, effective March 18, 1913, and served continuously as quartermaster and commanding officer of the supply company. Upon inquiry by the commanding officer of the regiment as to whether he must be relieved from such duty on March 17, 1917,

Held, that the commanding officer of the supply company in an Infantry regiment is a staff officer within the meaning of Army Regulations 249, and his tour of duty as such, taken in connection with any prior service as a regimental staff officer, can not exceed four years.

(6-124.23, J. A. G., Feb. 17, 1917.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

APPROPRIATIONS: Proceeds from sale of unsuitable quartermaster stores.

It was proposed to sell, after due public notice, a large quantity of nonregulation shoes purchased in the emergency of the mobilization of the National Guard, but never issued because it became possible to obtain shoes of the regulation pattern, and the question was presented whether the proceeds from such a sale could be deposited to the credit of the appropriation from which the shoes were purchased.

Held, that the act of March 23, 1910 (33 Stat., 257), relating to the deposit of proceeds from sales of serviceable supplies or stores is not an authority for the sale of property, nor does it apply to property sold to the general public; that there exists no authority of law for the sale of *serviceable* quartermaster supplies to the public generally, and that if the shoes be classed as "unsuitable for the public service" and sold as provided by section 1241, Revised Statutes, the proceeds must, under the general legislation in section 3618, Revised Statutes, be covered into the Treasury as miscellaneous receipts.

(Comp. of the Treas., Feb. 19, 1917.)

ARMY FIELD CLERKS: Allowances.

Held, that under the provisions of the statute providing for 200 Army field clerks a selection was necessary, and the statute was not, therefore, self-executing; consequently such clerks were entitled to the allowances therein provided for only from the date of their acceptance of appointment as field clerks and not from the date of the act, August 29, 1916.

(Comp. of the Treas., Jan. 26, 1917.)

ENLISTED MEN: Pay status of retired soldier under an enlistment in the National Guard.

In the case of an enlisted man on the retired list of the Regular Army, with pay status of the seventh enlistment period, who enlisted in the National Guard and, upon the President's call of June 18, 1916, was accepted and mustered into the service of the United States,

Held, that the soldier did not lose his continuous-service-pay status while in the active service of the United States as an enlisted man of the National Guard under the President's call, but was entitled to the pay of his grade in the National Guard as of the seventh enlistment.

Held further, that the soldier forfeited his right to retired pay during the period he remained in the active service of the United States under his enlistment as a member of the National Guard.

(Comp. Treas., Feb. 9, 1917.)

CIVILIAN EMPLOYEES: Computation of holiday pay of pieceworker.

In respect of the President's order of June 9, 1914, fixing four hours as a day's work on Saturdays from June 15 to September 15 of each year for all clerks and other employees of the Government, except as therein provided,

Held, that under the said Executive order four hours constitutes a day's work on Saturdays within the period specified in the order, and that, as all employees under the order are entitled to a full day's compensation for four hours' work, an employee paid on a piecework basis should be paid the same as if he had worked the full eight hours on Saturdays; that is to say, according to his average earnings.

(Comp. Treas., Jan. 15, 1917.)

CLAIMS: Private property destroyed.

In the case of an officer whose private property was destroyed by fire in quarters rented by him at his own expenses and for his own convenience,

Held, that the officer was not entitled to compensation for the loss under the provisions of the act of March 3, 1885 (23 Stat., 350), which act was intended to compensate officers and enlisted men for the destruction of their property through the casualties usually attending military life and peculiar thereto, and was not intended

to make the Government liable for such risks as are common to persons in civil life.

(23 Comp. Dec., 411.)

COMPTROLLER OF THE TREASURY: Jurisdiction.

In the case of a disallowance by the auditor of \$13.75 in a disbursing officer's accounts on account of an alleged overpayment to another officer, the latter refunded the amount upon the request of the disbursing officer but at the same time requested that the case be submitted to the comptroller for a review of the auditor's action. The War Department having complied with the officer's request,

Held, by the comptroller, that the refundment having been made, the auditor was authorized to credit the disbursing officer's accounts with the sum so refunded, and that there was therefore no ground for an appeal as to such settlement. Advised, however, that the papers would be forwarded to the auditor who had authority to settle the officer's claim for repayment of the sum refunded by him, and that if after such settlement the officer be dissatisfied with the auditor's action he could appeal to the comptroller.

(Comp. Treas., Jan. 29, 1917.)

DECISIONS OF THE COURTS.

(Digests prepared in the office of the Judge Advocate General.)

HORSES: Claims for loss of, in military service.

In a decision of the Court of Claims of January 17, 1916, in *Griffis v. United States*, it was held, overruling decision in the *Hardie case* (39 C. Cls., 250), that section 3482, Revised Statutes, as amended by the act of June 22, 1874, and subsequent acts, authorizing the reimbursement of officers for horses lost in the military service, had expired by limitation and no longer authorized such reimbursement. (Bul. No. 8, W. D., 1916, p. 13.) Upon a rehearing,

Held, That only for the purposes of the act of 1874 was section 3482, Revised Statutes, amended, and that after the act of 1874 expired by its limitation, section 3482, Revised Statutes, continued in force unaffected by the 1874 act and still remains in force. The former opinion in this case was modified accordingly. Section 3482, Revised Statutes, authorizes payment for horses killed in battle or lost under certain other described contingencies.

(*Frank C. Griffis v. United States*, decided by C. Cls., Feb. 5, 1917.)

PRIVATE PROPERTY: Destruction of by military forces.

Where militia troops were ordered out by the governor of a State for the purpose of restoring peace and order in a county declared by him to be in a state of insurrection, and the commanding officer of the militia ordered all saloons closed in a city in the troubled area between 7 p. m. and 8 a. m., with the warning that "the stock of liquors of any person or persons violating this rule will be destroyed

and all violators severely punished," and the stock of liquors of a saloon keeper was destroyed by subordinate officers because of the violation of the order,

Held, by the Supreme Court of Montana in a civil action against the commanding officer and his subordinates for damages, that the officers could not justify their act as a military necessity, there having existed no state of war and the liquors not being needed for or devoted to the use of the troops; that the destruction could be justified, if at all, only as a proper exercise of the police power of the State to maintain order, etc., but the destruction of private property under this power without compensation to the owner must be the last resort, available only in the presence of imminent danger and overwhelming necessity which brooks no delay, and that, as it was not alleged that the rioters were threatening or about to break into the saloon to obtain intoxicants, thereby making it necessary to destroy the stock to prevent excesses, such justification was not shown.

Held further, that the subordinate militia officers who merely followed their superior officer's commands in destroying the offending saloon keeper's stock were not subject to civil liability, since the order for the destruction of the property was one which the commanding officer might lawfully have made had the circumstances of the case warranted it, and, as it was valid on its face, the subordinate officers could not refuse obedience until they had investigated the legality of the order. Judgment against the commanding officer.

(*Herlihy v. Donohue, et al.*, Sup. Ct. of Montana, Nov. 10, 1916.)

BULLETIN 18.

BULLETIN }
No. 18. }

WAR DEPARTMENT,
WASHINGTON, April 6, 1917.

The following digest of opinions of the Judge Advocate General of the Army, for the month of March, 1917, and of certain decisions of the Comptroller of the Treasury and of courts, together with notes on military justice prepared under the direction of the Judge Advocate General, and a compilation of Federal and State laws prohibiting discrimination against the uniform, is published for the information of the service in general.

[2526413 B—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Major General, Chief of Staff.

OFFICIAL:

H. P. MCCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

AVIATION PAY: Officers' Reserve Corps.

Upon reference for opinion as to whether or not officers of the aviation section, Signal Officers' Reserve Corps, when assigned to duty requiring them to make regular and frequent aerial flights, are entitled to the extra pay authorized under section 13 of the national defense act, approved June 3, 1916.

Held, that as section 39 of the same act provides that Reserve Corps officers, when ordered "to duty with troops or at field exercises, or for instruction," when provision is made therefor, shall, while so serving, "receive the pay and allowances of their respective grades in the Regular Army," and as section 13 of said act specifically provides, with respect to aviation officers, that "each aviation officer authorized by this act shall, while on duty that requires him to participate regularly and frequently in aerial flights, receive an increase of twenty-five per centum in the pay of his grade and length of service under his commission," a Reserve Corps officer of the aviation section assigned to active duty requiring him to make regular and frequent aerial flights is entitled to receive the increased pay authorized for such duty, as such officer comes within the description, "each aviation officer authorized by this act."

(6-301, J. A. G., Mar. 12, 1917.)

CHAUFFEURS: Procurement of local licenses.

The decision of the Comptroller of the Treasury dated January 10, 1917 (23 Comp. Dec., 286), is conclusive that existing Federal appro-

priations are not available for the payment of license fees of chauffeurs for the operation of Government motor vehicles. Whether the States have the power to require such chauffeurs to provide themselves with licenses at their own expense, such expense being the cost of issuing the licenses by the State, has not been authoritatively settled, but

Held, that the Panama Canal authorities, having no power not conferred by Congress, clearly are not authorized to require individuals to obtain licenses as a prerequisite to the operation of Government vehicles, no such power having been granted by Congress. Suggested, however, that as a rule the Government should, in the interest of public safety and as a matter of comity, use diligence to see that its chauffeurs meet the usual local tests as to qualification, etc., and should provide them with evidence that they have been found qualified.

(92-525, J. A. G., Mar. 16, 1917.)

CIVILIAN EMPLOYEES: Stoppages to reimburse United States.

Where an applicant for enlistment was furnished transportation and subsistence from a recruiting office to the recruit depot and, instead of presenting himself for enlistment at the latter place, disappeared therefrom and afterwards obtained employment as a laborer at the Rock Island Arsenal,

Held, that aside from any criminal action that might be taken against the man on a charge of misappropriating Government property, deduction should be made from his pay earned as laborer at the arsenal to reimburse the United States the amount expended on him in connection with his application for enlistment, this being warranted whether his action be regarded as a breach of contract or as the procurement of the expenditures under false pretenses.

(72-510, J. A. G., Mar. 21, 1917.)

CLAIMS: Use of private property in public service.

Claim was made by certain National Guard officers for reimbursement of expenses incurred for gasoline and lubricating oil for motor cars belonging to the State and to militia organizations and to individuals used in the service of the United States. None of such cars had been formally transferred to the Federal service, but were taken with the organizations upon their being called into the Federal service without the knowledge or consent of the Quartermaster General, who had made provision for the hiring of motor cars when necessary.

Held, that the claim could not be allowed in the absence of a showing that the expense was incurred as the result of an emergency, it being a well-settled principle that the United States can not be made a debtor without its knowledge and consent, and that, except for certain personal expenses, officers of the Government are not entitled to reimbursement for expenditures made from their own private funds to pay legitimate expenses of the Government unless such expenditures are made under urgent and unforeseen public necessity (12 Comp. Dec., 308). If at any time the transportation facilities fur-

nished by the Government failed, and it became necessary to use the automobiles belonging to the State and to individuals and organizations in the service of the United States and they were so used in pursuance of competent orders, under such circumstances the expenses for their maintenance and operation would be a proper charge against the Government and payable from Army appropriations. Such obligation would arise under an implied contract, and no formal contract *nunc pro tunc*, such as suggested in this case would be necessary. But in no case where there was not an absolute emergency which required the practical taking over of the motor cars by the United States for operation under its supervision can reimbursement legally be made for any expense in connection therewith.

(18-600, J. A. G., Feb. 24, 1917.)

CONTRACTS: Extra work due to faulty design.

The contractors for the construction of a wharf submitted a claim for extra work required, before the completion of the wharf, to repair damages thereto caused by the sliding of the bank carrying the footings of the piles outward, causing the outer end of the wharf to settle below the required grade. At the time of the damage the wharf was completed, with the exception of certain braces, which could not be placed within the contract period because of the high water. The wharf was constructed strictly in accordance with the specifications and at the location designated by the post quartermaster. The contractors were required, against their protest, to remove the damaged portion of the wharf and rebuild the same strictly in accordance with the contract, and they have submitted their claim covering the extra work involved, on the ground that they were in no way responsible for the loss. The district engineer officer reports that the completed wharf, while not in immediate danger of loss, is liable to settle after each high water, and that it will probably be necessary to uncouple the floor of the same and raise it each year.

Held, in view of the facts stated above, that the case is one where the damages appear to be the result of defective design, and that there being nothing in the contract which could be fairly construed as making the contractors responsible for the design, the extra work was due to the fault of the Government in requiring the work to be done on plans which were defective for the location selected; citing 9 C. J., 752, and 8 L. R. A., N. S., 1171.

(76-700, J. A. G., Mar. 23, 1917.)

CONTRACTORS: Relief of.

A contractor for furnishing packing and waste applied for the cancellation of its contract on the ground that following the making thereof the demand for skilled labor and for the materials required for filling the contract, due to the continuation of the war in Europe, made it practically impossible for the contractor to execute the contract, and that the contractor, a company of limited means, would be required to suspend business unless relief be granted. The contract was an absolute one, binding the contractor to furnish the sup-

plies covered thereby as ordered to meet the requirements therefor during the fiscal year, and contained no exception under which the contractor would be entitled to relief on the ground applied for.

Held, that the facts stated did not make out a case of impossibility of performance such as would entitle the contractor to relief; the established rule of law in such cases being where an agreement is not impossible in its nature but is impossible in fact by reason of particular circumstances, such impossibility will not excuse the failure to perform an unconditional contract, whether it exists at the date of the contract or arises from events which happen afterwards; still less will unexpected difficulty or inconvenience short of impossibility serve as an excuse. Wald's *Pollock on Contracts*, Williston's edition, 1906, page 527, and cases cited in note on page 528.

Held, also, that the Secretary of War is without legal authority to grant relief on the ground of hardship, and that relief can only be given where the case falls within a rule of law under which the contractor is entitled to relief, or where relief is authorized by Congress. (Dig. Op. J. A. G., 926, and notes citing opinion of Atty. Gen. Black in 9 Op., 81)

(76-600, J. A. G., Mar. 10, 1917.)

EIGHT-HOUR LAW: Claim for overtime.

A civilian, employed with his team at a mobilization camp for the use of troops called into the Federal service, submitted a claim for pay for "overtime," in excess of eight hours a day. He was employed with the understanding that he would receive the same rate of pay as the other teamsters, which was \$5 a day. The other teamsters neither claimed nor were paid for overtime in excess of eight hours a day.

Held, that his claim was not payable for the following reasons:

The act of August 1, 1892 (27 Stat., 340), expressly permits the employment of "laborers and mechanics" for more than eight hours a day in case of "extraordinary emergency." The mobilization of the militia troops was an emergency within the meaning of this act. The Federal eight-hour statutes do not regulate compensation (*U. S. v. Martin*, 94 U. S., 400), and whenever, therefore, it is lawful to employ a laborer or mechanic for more than eight hours a day, the per diem compensation may be fixed by agreement for the lengthened day. The claimant, having been promised upon his employment the same compensation that was paid to the other teamsters, had notice of what constituted a day's work under his employment, and was, therefore, entitled to the same compensation as the other teamsters received and no more, provided that for the time, if any, which he worked in excess of the others, he would be entitled to pro rata compensation.

(58-150, J. A. G., Feb. 27, 1917.)

ENLISTED MEN: Discharge for convenience of the Government.

An honorable discharge of an enlisted man because of disability is a discharge for the convenience of the Government, and if the soldier has served more than one-half of his enlistment prior to such

discharge, he is entitled, in case he recovers and reenlists, to the benefits of the act of May 11, 1908 (35 Stat., 110), relating to continuous-service pay and bonus for reenlistment, according to the conditions therein prescribed.

(72-220, J. A. G., Mar. 22, 1917.)

ENLISTED MEN: Examination for commission, National Guard service.

On the question whether an enlisted man of the National Guard, proposing to transfer to the Regular Army, could count his National Guard service as a part of the required service to qualify him for the examination.

Held, that while the act of July 30, 1892 (27 Stat., 336), specified service "in the Army," the service described by this term undoubtedly meant service in the Regular Army, and that Federal service by a National Guard soldier can not therefore be credited to qualify the soldier for the examination. This view is supported by the act of February 2, 1901, section 28 of which provides for the same recognition to be given to volunteer as to regular service, a provision which would be unnecessary if the term "in the Army" does not mean service in the Regular Army, inasmuch as the act of April 22, 1898 (30 Stat., 361), defines the term "Army" as including the Volunteer Army.

(64-213, 64-310, J. A. G., Mar. 3, 1917.)

ENLISTED RESERVE CORPS: Pay of civil employee.

On the question whether a civil employee of the War Department who enlists in the Engineer Enlisted Reserve Corps can be given leave of absence with pay in his civil status while he is receiving training as a member of said corps and at the same time receive pay in his military status,

Held, that there can be no legal objection to his receiving the compensation of both places if the training is performed within his annual leave allowance, provided the combined compensation of both places does not exceed the sum of \$2,000, so as to come within the prohibition of section 6 of the act of May 10, 1916, as amended (39 Stat., 582); that as the two positions are entirely distinct, each with its own compensation and duties, the case does not come within the prohibition of sections 1763, 1764, and 1765, Revised Statutes; and that the military position is not an office within the meaning of the act of July 31, 1894 (28 Stat., 205), so as to preclude a civil employee, if his salary should be \$2,500 or more, from being a member of the Enlisted Reserve Corps.

(6-302, J. A. G., Mar. 8, 1917.)

LIGHTHOUSE SERVICE: Status of employees upon being transferred to the War Department in time of national emergency.

In case of a transfer of the Lighthouse Service to the War Department in time of national emergency, as provided by the act of August 29, 1916 (39 Stat., 602),

Held, that such employees will retain their civilian status and that the employees' compensation act of September 17, 1916 (39 Stat., 742), will be applicable to them in case of their injury or death in line of duty; and further, that in case of their capture by the enemy, the principles of international law relating to prisoners of war no doubt will apply.

(16-310, J. A. G., Mar. 9, 1917.)

NATIONAL GUARD: Payment of, for State duty under call of Governor.

Held, the President alone has authority to call forth the National Guard of the several States to protect railroads and factories as instrumentalities of the Federal Government. When the States themselves call forth such forces to guard such plants, they are exercising their own police power in the duty of protection which they owe to all property within their borders. While Congress may reimburse the States for the resulting benefit to the United States, the National Guard so called forth is not placed in the service of the United States, and neither the War Department nor any official thereof has authority to call for such service or funds to reward it when rendered.

(58-100, J. A. G., Mar. 12, 1917.)

NATIONAL GUARD: Power of President to call forth the National Guard to guard ammunition plants and railroads.

Held, when interference with the channels of postal, commercial, and military communication, or with other instrumentalities of the Federal Government, is apprehended, the President has power to call forth the militia to forestall such interference. This power is a concomitant of his constitutional duty to see that the laws are faithfully executed. The method for its exercise is prescribed in section 3, act of May 27, 1908 (34 Stat., 402), which authorizes the President to call forth such number of the militia as he may deem necessary to execute the laws, subject only to the condition that the available regular forces be employed for this purpose before recourse is had to the militia.

(58-100, J. A. G., Mar. 12, 1917.)

NATIONAL GUARD: Travel expenses in responding to President's call.

An enlisted man of the National Guard applied for reimbursement of his travel expenses incurred in reporting at his company rendezvous for Federal service under the President's call of June 18, 1916.

Held, that there is no statutory authority for the reimbursement of such expenses.

(58-700, J. A. G., Mar. 17, 1917.)

OFFICERS: Transfer of, from line to Engineer Corps.

On the question whether or not an officer of the line of the Army may be transferred to the Corps of Engineers under section 25 of the

national defense act of June 3, 1916, authorizing the transfer between branches of the line of the Army for the purpose of lessening inequalities of promotion due to increases under said act,

Held, that such transfer is not authorized. While engineer officers serving with engineer troops are a part of the line of the Army, section 22 of the act of February 2, 1901, prescribing that "the enlisted force of the Corps of Engineers and the officers serving therewith shall constitute a part of the line of the Army," they hold their offices in the Corps of Engineers and are merely detailed on duty with troops; that such vacancies as may be said to occur in the commissioned personnel of troop organizations are not filled by appointment to office but by the detail of a person holding office in the Corps of Engineers; and that the transfer of a line officer to the Corps of Engineers would not fill a vacant office in the line, but would fill a vacant office in a staff corps.

(6-226, J. A. G., Mar. 24, 1917.)

OFFICERS: Transfer of; personal examination.

On the question whether section 25 of the national defense act of June 3, 1916, in prescribing a "personal examination" by the examining board "of such officer and of his official record," requires the bodily presence of the officer before the board, it being pointed out that such interpretation would involve in many cases extensive journeys at very great expense,

Held, that the word "personal" may be used either subjectively or objectively; that, with reference to the official record, the word is evidently used subjectively and relates to the board, and that if the word is so construed with reference to the officer it would not require the bodily presence of the candidate. As the meaning of the term is doubtful, in deference to the rule that where the language is doubtful a construction which gives it reasonable effect is preferred to one which results in very great inconvenience (*United States v. Fisher*, 2 Cranch, 286), the statute in this case should be construed so as not to require a candidate to appear in person before the board which makes recommendations as to his transfer.

(64-221.4, J. A. G., Mar. 12, 1917.)

OFFICERS, DENTAL CORPS: Retirement of, upon failure to pass physical examination for promotion.

The question was presented as to the proper disposition of a first lieutenant, Dental Corps, who appeared before an examining board to determine his fitness for promotion under the provisions of section 10 of the national-defense act and was found by the board to be disqualified both physically and mentally.

Held, that under the provision of said section which makes applicable to him "all laws relating to the examination of officers of the Medical Corps for promotion," he is, by reason of having failed to pass his physical examination for promotion, entitled to be retired with the rank of captain.

(6-227.3, J. A. G., Mar. 20, 1917.)

PORTO RICO REGIMENT: Detached service of officers.

Upon reference to the Judge Advocate General for opinion as to the eligibility of a first lieutenant of the Porto Rico Regiment of Infantry for detail as a student officer in the Ordnance Department under section 21 of the national-defense act of June 3, 1916, providing that captains and lieutenants of said regiment "shall also be eligible for such detached service, transfer, or promotion to duty with other organizations as may be approved by the Secretary of War; but vacancies created by such appointments of officers shall not be filled by promotions or appointments."

Held, that as section 12 of the same act clearly contemplates that lieutenants detailed as student officers in the establishments of the Ordnance Department shall be eligible, if they satisfactorily complete the course of instruction, for detail to fill vacancies in the Ordnance Department for the period of four years and for redetail for like periods during their commissioned service, and provides also that vacancies resulting from details to vacancies in the Ordnance Department shall be filled by promotion or appointment, while, as to details for detached service of captains and lieutenants of the Porto Rico Regiment it is expressly provided that they shall not be filled by promotion or appointment, it must be *held* that such officers of said regiment are not eligible for detail to vacancies in the Ordnance Department or for detail as student officers in the ordnance establishments for the reason that such details contemplate eligibility for subsequent details in the ordnance establishment.

Held further, that the provisions of section 21 would be given reasonable effect by limiting their operation to details for detached service other than the filling of vacancies in respect to which the law provides that details thereto shall create vacancies to be filled by promotion or appointment.

(6-260, J. A. G., Mar. 10, 1917.)

PURCHASE OF SUPPLIES: Exchange of typewriters and subscriptions to periodicals.

The general statutory provisions authorizing the exchange of typewriters, adding machines, and other similar labor-saving devices (sec. 5 of the general deficiency appropriation act, approved Mar. 4, 1915, 38 Stat., 1161) and the advance payment of subscriptions to periodicals (sec. 5, legislative, executive, and judicial appropriation act, approved Mar. 4, 1915, 38 Stat., 1049), *held* applicable to all branches of the public service for which appropriations are made by Congress, no specific statutory authority for the purpose in connection with the appropriations being deemed necessary.

(56-120, J. A. G., Mar. 23, 1917.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

CIVILIAN EMPLOYEES: Holiday pay.

Where a tentmaker was given a "temporary" appointment pending the procurement of an eligible list by the Civil Service Commis-

sion, his employment, however, being continuous and for an indefinite period.

Held, that he was entitled to the same right to pay for holidays as if his employment had been permanent, the words "temporary" and "permanent" in such cases having relation to the civil service status and not necessarily to the continuity or permanence of the employment.

(Comp. Treas., Mar. 10, 1917.)

CLAIMS: Rental for lands purchased, between date of execution of deed and of final payment.

Where the United States is in possession of land under an annual lease, and during the life of the lease the land is purchased and deed executed but payment is not made until several months thereafter owing to delay in the approval of the title papers by the Attorney General,

Held, that the delivery of the deed of conveyance changed the relation of the parties from landlord and tenant to that of vendor and vendee; that upon final acceptance by the United States the title related back to the date of the delivery of the deed, and that therefore payment of a claim for rental was not authorized, since the United States could not be expected to pay rent on property of which it held the title.

(Comp. Treas., Mar. 12, 1917.)

CONTRACTS: Purchase of supplies for Army in absence of appropriations.

In case of the purchase of supplies, etc., for the Army, under section 3732, Revised Statutes, as amended (34 Stat., 255), in the absence of appropriations,

Held, that there is no objection to the delivery of vouchers therefor to the contractors bearing a dated and signed statement to the following effect:

"This account is not payable at this time by reason of the fact that no funds are now available, owing to the failure of Congress to pass the general deficiency bill. Payment will be made to the contractor named on the voucher when funds become available. This is the original voucher, and no other voucher will be issued covering this transaction except on conclusive proof of the loss of the original."

Further suggested, as the better plan, that any claim or so-called voucher should be sent to the Auditor for the War Department for settlement, in which case the auditor "can certify the amount due and transmit his certificate to the Secretary of the Treasury immediately. The claimant can then be furnished a certified copy of the auditor's certificate, which will be evidence that he has a certain, liquidated, and conclusive balance due from the United States, payable immediately upon the making of an appropriation by law. The fact as to future appropriations will appear in the certificate."

(Comp. Dec., Mar. 22, 1917.)

DEATH GRATUITY STATUTE: Not applicable to Army Nurse Corps.

The act of May 11, 1908, as amended (35 Stat., 108; *id.* 735), relating to the payment of death gratuities under the conditions therein

prescribed is limited to "any officer or enlisted man on the active list of the Army."

Held, that this statute does not apply to members of the Army Nurse Corps; that while the words "officers and enlisted men" may be used in an act of Congress with a broader meaning than the words usually imply, the context of the act here in question, as well as the policy back of the law, indicate that a meaning broader than that usually attached to those words was not intended, this conclusion being justified by the fact that the act specifically provides that payment of the amount therein authorized shall be made to the *widow* or any other persons previously designated by *him*, and the further fact that as the Army Nurse Corps was in existence at the time when the act of May 11, 1908, was passed, if Congress had intended to include within its operation the members of the Army Nurse Corps, or any other civilians, it would doubtless have used language more indicative of that purpose.

(Comp. Treas., Mar. 24, 1917.)

MEDICAL TREATMENT: Soldier in private hospital at time of muster out.

Upon the question whether in the case of certain enlisted men of the National Guard remaining in a private hospital for treatment after the muster out of their organization, payment for the hospital treatment could be made from public funds.

Held, that the discharge of an enlisted man of the Organized Militia or National Guard in the actual service of the United States who is a patient in a hospital at the time of the actual discharge (on or after formal muster out) from the service of the United States of the organization of which he was a member takes effect on the day he is chargeable with receipt of notice of such muster out, unless it be clearly shown that he has been held by competent authority to further military service; that the law authorizes payment for the medical care and treatment and the subsistence "of officers, enlisted men, and civilian employees of the Army" in private hospitals, whenever such care and treatment can not be given in a military hospital, and that if any such officers, enlisted men, and civilian employees are retained and cared for as patients in private hospitals after their discharge from the military service of the United States takes effect, the claim in each case should be settled upon the facts adduced; such claim to be sent to the Auditor for the War Department for examination and settlement.

(Comp. Treas., Feb. 3, 1917.)

DECISIONS OF THE COURTS.

(Digests prepared in the office of the Judge Advocate General.)

CLAIMS: Loss of private property in the military service.

Where a claim for the loss by a soldier of private property in the military service was not presented to the accounting officers of the Treasury within two years, as prescribed by the act of March 3, 1885 (23 Stat., 350), and suit was thereafter brought in the Court of Claims to recover the value of the property,

Held, that no claim having been made within the time fixed by the statute, the court was without jurisdiction.

(*Thomas C. Goodman v. The United States*, decided by Court of Claims, Feb. 26, 1917.)

EVIDENCE: Corroboration in case of confession.

On the trial of a defendant for knowingly receiving in pledge from a soldier an automatic pistol, the property of the United States, in violation of section 35 of the Federal criminal code,

Held, that the confession of the defendant that he received the pistol in pledge from a soldier was sufficiently corroborated to justify the submission of the case to the jury by evidence showing that the pistol was issued to a soldier, and that it was found in the possession of defendant, whose place of business was very near the reservation on which such soldier was stationed; and further, that evidence that the pistol was found in defendant's possession was sufficient to sustain a verdict of guilty under Revised Statutes 1242 and 3748.

Held further, that evidence offered by defendant to show that the pistol had been charged to the soldier was properly excluded where the evidence did not show that he was the owner at the time it was pledged, but that the charge was made after its loss was known.

(*Bolland v. United States*, 238 Fed., 529.)

PUBLIC PROPERTY: Appropriation of, to private use.

An applicant for enlistment, who falsely represented that he had had no previous service in the Army and was furnished subsistence and transportation to the recruit depot where it was ascertained that he had been dishonorably discharged from the Army and was not eligible for reenlistment, was indicted for applying to his own use subsistence and supplies furnished to be used for military service, in violation of section 36 of the Federal Criminal Code, which declares:

"Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of any ordnance, arms, ammunition, clothing, subsistence, stores, money, or other property of the United States, furnished or to be used for the military or naval service, shall be punished." etc. Upon a demurrer,

Held, by the court, that the charge against defendant did not constitute a violation of the statute; that the section does not apply to one who has used the property for the very purpose for which it was given; that is to say, one who has used for the purpose of subsistence the property given him for subsistence and has used for transportation to a designated place the property given him to be used for transportation to that place.

(*U. S. v. Buchanan*, 238 Fed., 877.)

NOTES ON ADMINISTRATION OF MILITARY JUSTICE.

(Prepared under the direction of the Judge Advocate General of the Army upon the review of records of general courts-martial trials.)

SENTENCES: Retention of soldiers, guilty of offenses involving moral turpitude, not favored.

(1) A soldier, who was convicted of forgery and uttering forged instruments on four counts, was sentenced to two months' imprison-

ment. The case was returned to the court for reconsideration of its sentence. The court adhered to its former sentence. It was again returned, with the result that the court then imposed a sentence of two months' confinement and the forfeiture of two-thirds of his pay per month for a like period, which the provisional division commander in his review characterized as a travesty on justice.

(2) A soldier, who was convicted of larceny of Government property, was sentenced to three months' imprisonment, which the provisional division commander approved even without comment.

(3) A soldier, convicted of fraudulent enlistment for concealing from the recruiting officer the fact of his dishonorable discharge from a former enlistment on account of embezzlement, was sentenced to dishonorable discharge and one year's confinement, which was reduced to confinement for four months and forfeiture of one-half of his pay per month for a like period.

These cases indicate to the service as a whole and to the public that courts of officers and reviewing authorities are of the opinion that enlisted men convicted even of felonies may be retained in the service. Under the law, a man so convicted can not be enlisted. The War Department has deemed it of such importance to keep out of the service men convicted of even less serious offenses that have called for imprisonment in a reformatory, jail, etc., that regulations have been issued prohibiting such enlistments. If a man is found guilty of an offense of this sort, he must be regarded as having placed himself in a situation where mitigating circumstances will not serve to hold him in the service, though they may be considered for the purpose of reducing or wholly remitting any other part of the sentence imposed upon him. A standard lower than this would be extremely harmful to the service. Any community in which a regiment is stationed, knowing that a single convicted thief is amongst its personnel, are disposed to judge its standard by the individual. No sympathy for an accused should therefore, in any case, be allowed to weigh to the extent of retaining in the service soldiers convicted of offenses involving moral turpitude. Clemency can not restore to them the respect of their associates or the public, nor eliminate the scandal and suspicion that attach to the service by the retention of such men in the Army.

The above-recited principles apply as well to the National Guard in the service of the United States as to the Regular Army.

HEARSAY EVIDENCE: Not admissible because made by an officer in course of an official investigation.

In the case under consideration—and in others the same misconception crops out—the Judge Advocate contended that the officer who preferred the charges, when sworn as a witness, could testify to all facts that he had gained from the investigation, whether hearsay or not. This, of course, was error. (See Manual for Courts-Martial, par. 221.)

OBJECTION TO MEMBER OF COURT: Can be made at any time in proceedings.

After all the evidence had been taken in this case, counsel for the accused stated:

"I should like to call the court's attention to the fact the testimony has brought out the fact that one of the members of the court is vitally interested in this case; he has conducted the search and is absolutely familiar with the details and has probably formed his own opinions in the matter. I appeal to the members of this court who are lawyers that the member of the court is incompetent in that he is biased in the case. We did not know that at the time of the introduction of the facts, otherwise would have objected at the start. We do not think the gentleman is fit to sit on the case, but it has developed since the case opened that a member of the court is incompetent."

The president ruled that it was too late to object to the member sitting on the court, stating that the counsel for the accused had the right to attack the legality of the court at the opening of the case. Counsel insisted on his right to object at that time, and was overruled by the court.

The ruling of the court was error, as the accused would have had the right to enter an objection to any member of the court up to the last minute upon the statement, and proof if required, that the facts upon which the objection was based were not within his knowledge at the time when such objection is ordinarily made. Of course, objection should be made on these grounds as soon as the knowledge upon which it is based has come into the possession of the accused.

FEDERAL AND STATE LAWS PROHIBITING DISCRIMINATION AGAINST THE UNIFORM.

1. UNITED STATES.

Hereafter no proprietor, manager, or employee of a theater or other public place of entertainment or amusement in the District of Columbia, or in any Territory, the District of Alaska, or insular possession of the United States, shall make, or cause to be made, any discrimination against any person lawfully wearing the uniform of the Army, Navy, Revenue-Cutter Service, or Marine Corps of the United States because of that uniform, and any person making, or causing to be made, such discrimination shall be guilty of a misdemeanor, punishable by a fine not exceeding five hundred dollars. (Act of Mar. 1, 1911, 36 Stat., 963.)

2. CONNECTICUT.

Every person who shall subject or cause to be subjected any other person to the deprivation of any rights, privileges, or immunities usually enjoyed by the public, on account of membership in the military or naval service of this State or of the United States, or on account of the wearing of the uniform of such service, or who, on account of such membership or the wearing of such uniform, shall deprive any other person of the full and equal enjoyment of any advantages, facilities, accommodations, amusement, or transportation, subject only to the limitations established by law and applicable alike to all persons, or who, on account of such membership or the wearing of such uniform, shall discriminate in the price for the

enjoyment of any such privileges, shall forfeit and pay to the person injured thereby double damages, to be recovered in any court of competent jurisdiction within this State. (Public acts, 1909, ch. 192.)

3. FLORIDA.

No person shall prohibit or refuse entrance to any officer or enlisted man of the Army or Navy of the United States or of the National Guard of this State into any public entertainment or place of amusement because such officer or enlisted man is wearing the uniform of the organization to which he belongs. * * *

Any person violating the provisions of the foregoing paragraphs of this section shall be deemed guilty of a misdemeanor, and, upon conviction before a court of competent jurisdiction, may be fined not exceeding two hundred dollars, or sentenced to a confinement for not exceeding six months, or both, at the discretion of the court. (Compiled laws, 1914, sec. 731.)

4. KENTUCKY.

Nor shall the owner, proprietor, manager, or employee of any hotel, opera house, skating rink, or any other place of public amusement or entertainment deny admission to, or in any way, discriminate against, any member of the Organized Militia of the United States, or of the United States Army, Navy, or Marine Corps, on account of his being in the uniform of his rank and service. * * * Any person violating any provision of this section shall, upon conviction, be punished by a fine not exceeding three hundred dollars. (Statutes, 1915, sec. 2660.)

5. MARYLAND.

It shall be unlawful for the owner, or the owner's agent, whatever may be the latter's designation, of any place of amusement or of recreation otherwise opened to the general public, admission to which is free or otherwise, to refuse admission to or exclude from the said place of amusement or of recreation, any officer or enlisted man of the United States Army, Navy, Marine Corps, Revenue-Cutter Service, the National Guard of this State or of any State, Territory, and of the District of Columbia, by reason of such officer or enlisted man being in uniform, and any such owner, or agent aforesaid, who upon conviction before a court of criminal jurisdiction shall be found guilty of a violation of the provisions of this section shall be deemed, and he is hereby, declared to be guilty of a misdemeanor and shall be fined a sum not exceeding five hundred dollars or imprisoned for not more than six months, or both, in the discretion of the court. (Annotated Code of Maryland, vol. 3, art. 65, sec. 83.)

6. MASSACHUSETTS.

No proprietor, manager, or employee of a theater or other public place of entertainment or amusement shall make, or cause to be made, any discrimination against any person lawfully wearing the uniform of the Army, Navy, Revenue-Cutter Service, or Marine Corps of the

United States because of that uniform, and any person making, or causing to be made, such discrimination shall be guilty of a misdemeanor, punishable by a fine not exceeding five hundred dollars. (Acts and resolves, 1911, ch. 460.)

7. MINNESOTA.

It shall be unlawful for any common carrier, innkeeper, or proprietor or lessee of any place of public amusement or entertainment, or any agent, servant, or representative of any such common carrier, innkeeper, proprietor or lessee as aforesaid, to debar from the full and equal enjoyment of the accommodations, advantages, facilities, or privileges of any public conveyance on land or water or any inn or of any place of public amusement or entertainment, any person in service in the Army, Navy, Marine Corps, or Revenue-Cutter Service of the United States, or of the National Guard or naval service of this State, or otherwise in the military or naval service of the United States, or of this State, wearing the uniform prescribed for him at that time or place by law, regulation of the service, or custom, on account of his wearing such uniform, or of his being in such service.

Any person who is debarred from such enjoyment contrary to the provisions of section 3998 of this act shall be entitled to recover in an action on the case from any corporation, association, or person guilty of such violation, his actual damages and \$100 in addition thereto; and evidence that such person debarred was at the time sober, orderly, and willing to pay for such enjoyment in accordance with rates fixed therefor for civilians, shall be prima facie evidence that he was debarred on account of his wearing such uniform or of his being in such service.

Any person violating any provision of this act shall be guilty of a misdemeanor. (General Statutes, 1913, secs. 3998, 3999, 4000.)

8. NEW HAMPSHIRE.

Hereafter no proprietor, manager, or employee of a theater or other public place of entertainment or amusement in the State of New Hampshire shall make or cause to be made any discrimination against any person lawfully wearing a uniform of the Army, Navy, Revenue-Cutter Service, or Marine Corps of the United States, or of the militia of this State, because of that uniform; and any person making or causing to be made such discrimination shall be guilty of a misdemeanor and punishable by a fine not exceeding one hundred dollars. (Public Statutes, Laws, 1911, ch. 140.)

9. NEW YORK.

A person who excludes from the equal enjoyment of any accommodation, facility, or privilege furnished by innkeepers or common carriers, or by owners, managers, or lessees of theaters or other places of amusement or resort, any person lawfully wearing the uniform of the Army, Navy, Marine Corps, or Revenue-Cutter Service of the United States because of that uniform, is guilty of a misdemeanor. (Laws, 134th session, 1911, vol. 1, ch. 410.)

10. OKLAHOMA.

Any person, persons, firm, or corporation who shall refuse admittance to or eject from any place where the public is admitted, such as hotels, cafés, places of amusement, etc., any member of the United States Army, Navy, Marine Corps, Naval or Military Academy, or of the National Guards of any State, Territory, or the District of Columbia on account of his uniform, shall be guilty of a misdemeanor, and shall be punishable by a fine of not less than \$50 nor more than \$200, or imprisonment in the county jail for not to exceed thirty days, or by both such fine and imprisonment, at the discretion of the court. (Session Laws, 1910-11, ch. 153.)

11. PENNSYLVANIA.

No proprietor, manager, or employee of a theater, or other place of entertainment or amusement, in the State of Pennsylvania, shall make or cause to be made any discrimination against any person wearing the uniform of the United States because of that uniform; and any person making or causing to be made such discrimination shall be deemed guilty of a misdemeanor, punishable by a fine not exceeding five hundred dollars, or by imprisonment not exceeding one year, or by both. (Public Law 125, May 5, 1911; Purdon's Digest, vol. 7, p. 7718.)

12. RHODE ISLAND.

It shall be unlawful for any common carrier, innkeeper, or proprietor or lessee of any place of public amusement or entertainment, or any agent, servant, or representative of any such common carrier, innkeeper, proprietor, or lessee as aforesaid, to debar from the full and equal enjoyment of the accommodations, advantages, facilities, or privileges of any public conveyance on land or water, of any inn, or of any place of public amusement or entertainment any person in the military or naval service of the United States or of this State wearing the uniform prescribed for him at that time or place by law, regulation of the service, or custom, on account of his wearing such uniform or of his being in such service. (General Laws, 1909, ch. 349, sec. 46.)

13. VIRGINIA.

Be it enacted by the General Assembly of Virginia, That it shall be unlawful for any common carrier, innkeeper, or proprietor or lessee of any place of public amusement or entertainment, or any agent, servant, or representative of any such common carrier, innkeeper, proprietor, or lessee as aforesaid, to debar from the full and equal enjoyment of the accommodations, advantages, facilities, or privileges of any public conveyance on land or water, or any inn, or any place of public amusement or entertainment, any person in the Army, Navy, Marine Corps, or Revenue-Cutter Service of the United States, or of the National Guard or naval service of this State, or otherwise in the military or naval service of the United States, or of this State, wearing the uniform prescribed for him at that time or place by law, regulation of the service, or custom, on account of his wearing such uniform or of his being in such service.

Any person who is debarred from such enjoyment contrary to the provisions of section 1 of this act shall be entitled to recover in an action on the case from any corporation, association, or person guilty of such violation, his actual damages and one hundred dollars in addition thereto; and evidence that such person debarred was at the time sober, orderly and willing to pay for such enjoyment in accordance with rates fixed therefor for civilians, shall be prima facie evidence that he was debarred on account of his wearing such uniform or of his being in such service. But nothing in this act shall be construed to conflict with existing laws representing the separation and segregation of the races in this Commonwealth.

Any person violating any provision of this act shall be guilty of a misdemeanor. (Acts of assembly, 1916, ch. 433.)

NOTE.—Sec. 125 of the national defense act (39 Stat., 216) makes it unlawful for any person, not an officer or enlisted man of the United States Army, Navy, or Marine Corps, with certain enumerated exceptions, “to wear the duly prescribed uniform of the United States Army, Navy, or Marine Corps, or any distinctive part of such uniform, or a uniform any part of which is similar to a distinctive part of the duly prescribed uniform of the United States Army, Navy, or Marine Corps,” making the offense punishable by a fine not exceeding \$300 or by imprisonment not exceeding six months or by both such fine and imprisonment. This section was made applicable to the Coast Guard by the act of August 29, 1916 (39 Stat., 649). Similar laws designed to prohibit the wearing of the uniform by anyone not in the military service have been enacted in the following States: Alabama, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, New Hampshire, New Mexico, New York, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin.

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ABBREVIATIONS DENOTING ORIGIN OF OPINIONS OR DECISIONS DIGESTED.

At. Gen.	Attorney General.
Comp.	Comptroller's decisions.
Ct. Cls.	Court of Claims.
D. C. App.	District of Columbia Appeals.
Fed. Ct.	Federal courts.
J. A. G.	Judge Advocate General.
St. Ct.	State courts
Sup. Ct., P. I.	Supreme Court, Philippine Islands.
Tr. Ct., P. I.	Trial Court, Philippine Islands.

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